DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1545
Vide 11-1547
Title: City of Arlington, Texas, et al., Petitioners
v.
Federal Communications Commission, et al.
Docketed: June 28, 2012
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (10-60039)
Decision Date: January 23, 2012
Rehearing Denied: March 29, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 27 2012	Petition for a writ of certiorari filed. (Response due July 30, 2012)
Jul 24 2012	Order extending time to file response to petition to and including August 29, 2012, for all respondents.
Jul 30 2012	Brief amici curiae of National Water Resources Association, et al. filed.
Aug 28 2012	Brief of respondents CTIA - The Wireless Associations, et al. in opposition filed. VIDED
Aug 29 2012	Brief of respondents Federal Communications Commission, et al. in opposition filed. VIDED.
Sep 11 2012	Reply of petitioner City of Arlington, Texas, et al. filed.
Sep 12 2012	DISTRIBUTED for Conference of October 5, 2012.
Oct 5 2012	Petition GRANTED limited to Question 1 presented by the petition. The petition for a writ of certiorari in No. 11-1547 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Oct 31 2012	SET FOR ARGUMENT ON Wednesday, January 16, 2013.
Oct 31 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents CTIA - The Wireless Association and Verizon Wireless. VIDED
Nov 6 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Intervenors, International Municipal Lawyers Association, et al.
Nov 8 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for all petitioners. VIDED
Nov 15 2012	Motion to dispense with printing the joint appendix filed by petitioners City of Arlington, Texas, et al. VIDED.
Nov 19 2012	Brief of petitioners City of Arlington, Texas, et al. filed.
Nov 19 2012	Brief of respondents International Municipal Lawyers Association, et al. in support of

petitioners filed. VIDED.

Nov 20 2012 Record received from U.S.C.A. for 5th Circuit. (1box)

Nov 21 2012 Brief amici curiae of American Farm Bureau Federation, et al. filed. VIDED.

Nov 21 2012 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Cable Telecommunications and Technology Committee of the New Orleans City Council. VIDED.

Nov 26 2012 Brief amicus curiae of Southern Company filed. VIDED. (Distributed)

Nov 26 2012 Brief amici curiae of National Water Resources Association, et al. filed. VIDED. (Distributed)

Nov 26 2012 Brief amici curiae of Cato Institute, et al. filed. VIDED. (Distributed)

Nov 26 2012 Brief amici curiae of National Governors Association, et al. filed. VIDED (Distributed)

Nov 27 2012 CIRCULATED

Dec 3 2012 Motion to dispense with printing the joint appendix filed by petitioners GRANTED.

Dec 3 2012 Motion for divided argument filed by respondent Cellco Partnership d/b/a Verizon Wireless. VIDED.

Dec 12 2012 Brief of respondent Cellco Partnership d/b/a Verizon Wireless filed. VIDED. (Distributed)

Dec 19 2012 Brief of respondents Federal Communications Commission, et al. filed. VIDED.

Dec 19 2012 Brief amici curiae of AT&T Services Inc., et al filed. VIDED. (Distributed)

Dec 21 2012 Brief amici curiae of T-Mobile USA, Inc., et al. filed. VIDED. (Distributed)

Dec 26 2012 Motion for divided argument filed by petitioner Cable, Telecommunications, and Technology Committee of the New Orleans City Council. VIDED.

Dec 26 2012 Brief amicus curiae of PCIA - The Wireless Infrastructure Association filed. VIDED. (Distributed)

Jan 4 2013 Motion for divided argument filed by respondent. Cellco Patnership d/b/a Verizon Wireless DENIED. VIDED.

Jan 4 2013 Motion for divided argument filed by petitioner DENIED. VIDED.

Jan 8 2013 Reply of petitioners City of Arlington, Texas, et al. filed. VIDED. (Distributed)

Jan 9 2013 Reply of respondents International Municipal Lawyers Association, et al. in support of petitioners filed. VIDED. (Distributed)

Jan 10 2013 Motion for leave to file a reply brief on the merits filed by EMR Policy Institute. VIDED.

Jan 16 2013 Argued. For petitioners: Thomas C. Goldstein, Washington, D. C. For respondents: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C.

Jan 22 2013 Motion for leave to file a reply brief on the merits DENIED.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 11-1545

SUPREME COURT, U.S.
FILED
JUN 27 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; CITY OF LOS ANGELES, CALIFORNIA; COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; COUNTY OF SAN DIEGO, CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,

Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

This case involves a challenge to the FCC's jurisdiction to implement §332(c)(7) of the Communications Act of 1934, titled "Preservation of Local Zoning Authority." Section 332(c)(7) imposes certain limitations on State and local zoning authority over the placement of wireless service facilities, but authorizes the FCC to address only one of these limitations; it states that no other provision "in this Act" may "limit" or "affect" State and local authority over wireless facilities placement. The FCC concluded that other provisions "in this Act" authorize it to adopt national zoning standards to implement §332(c)(7). The Fifth Circuit deferred to the FCC's jurisdictional determination applying *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), but acknowledged that "[t]he Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to this issue."

The case presents two questions:

1. Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction; and

2. Whether the FCC may use its general authority under the Communications Act to limit or affect State and local zoning authority over the placement of personal wireless service facilities.

Parties to the Proceeding

Petitioners below are the City of Arlington, Texas, and the City of San Antonio, Texas. Intervenors supporting the Petitioners are the Cable and Telecommunications Committee of the New Orleans City Council; the City of Carlsbad, California; the City of Dallas, Texas; the City of Dubuque, Iowa; the County of Fairfax, Virginia; the City of Glendale, California; the City of Los Angeles, California; the County of Los Angeles, California; the City of Portland, Oregon; the City of San Antonio, Texas; the County of San Diego, California; the EMR Policy Institute; the International Municipal Lawyers Association; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; the National League of Cities; the Texas Coalition of Cities for Utility Issues; and the United States Conference of Mayors.

Respondents are the United States of America and the FCC. Intervenors supporting the Respondents are CTIA-The Wireless Association and Cellco Partnership.

None of the Petitioners is a non-governmental corporation.

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Petition for a Writ of Certiorari

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Opinion and Order Below

The court's opinion (App. 1a-68a) is reported at 668 F.3d 229 (5th Cir. 2012). The FCC's Declaratory Ruling (App. 69a-171a) is reported at 24 FCC Rcd. 13994 (Nov. 18, 2009) ("Declaratory Ruling"), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010) (App. 172a-195a).

Jurisdiction

The court entered its judgment on January 23, 2012, and entered an order denying petitions for rehearing *en banc* on March 29, 2012. (App. 195a-196a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

Section 332(c)(7) of the Communications Act of 1934 provides:

Preservation of local zoning authority.

(A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after

such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions. For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) [47 U.S.C. §303(v)]).

* * *

Other relevant statutory provisions appear in the appendix.

Statement of the Case

This case concerns a dispute between local governments and the FCC over whether the federal agency may affect State and local authority over the placement of wireless communications facilities by, *inter alia,* establishing uniform FCC-mandated deadlines for State and local action on zoning appli-

cations. Petitioners claimed that Congress deliberately designed §332(c)(7) to prevent the FCC from interfering with State and local zoning decisions: Congress required State and local decisions to meet certain standards, subject only to exclusive judicial review (with one exception); it directed the FCC to address radio frequency (RF)-emissions matters; and it provided that "nothing" else "in this Act" may "limit or affect" local authority over wireless facility placement. The FCC claimed that it could establish federal policy implementing §332(c)(7)(B) by using four *other* provisions of the Act, 47 U.S.C. §§151, 154(i), 201(b), and 303(r).

Rather than resolve the dispute through *de novo* review, the Fifth Circuit deferred to the FCC's jurisdictional determination, and then upheld the FCC's Declaratory Ruling.

1. Added to the Communications Act by the Telecommunications Act of 1996,[1] §332(c)(7) establishes what several justices of this Court have described as an unusually "comprehensive" statutory scheme for balancing the interests of the federal, state, and local governments in deployment of wireless facilities. *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (Stevens, J., concurring); *see also id.* at 129 (describing §332(c)(7) as "a comprehensive and exclusive remedial scheme") (Breyer, J., concurring).

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[1] Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996). The Telecommunications Act of 1996 is a series of amendments to the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §151 *et seq.* (the "Communications Act" or the "Act").

The House of Representatives initially had passed language empowering the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). App. 212a. The bill directed the FCC to adopt "policies" requiring a local government to act "within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.*

Congress, however, "ultimately rejected the national approach and substituted a system based on cooperative federalism." *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). In conference, Congress opted for the current §332(c)(7) titled "Preservation of Local Zoning Authority." The statute consists of a paragraph with five limitations on State and local zoning authority,[2] and an opening "general authority" clause stating that "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect" this State and local authority. 47 U.S.C. §332(c)(7)(A).

Section 332(c)(7) gives the FCC authority to address only one of the statute's limitations, the bar on State and local siting decisions based on the environmental effects of radio frequency ("RF") emis-

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[2] 47 U.S.C. §332(c)(7)(B)(i)-(iv).

sions.[3] Otherwise, it directs courts to resolve issues arising under §332(c)(7) on an expedited basis. The Conference Report confirmed that except for the provisions concerning the effects of radio frequency ("RF") emissions, Congress intended for the courts to have "exclusive jurisdiction over all other disputes arising under this section." H.R. Rep. No. 104-458 (1996) (Cong. Rep.) at 207-208. The Report directed that "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated." *Id.* It further explained that the requirement that a local government act within a "reasonable period of time" is not intended "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." *Id.* The statute's generally-worded language was not an invitation for federal policymaking, but a direction to the court to consider State and local practices in light of local circumstances.

2. For the next 13 years, the FCC did not regulate State and local zoning authority under §332(c)(7), except to address RF-emissions matters. Section 332(c)(7) operated by allowing courts to apply the statute to local facts, in what one court described as a "refreshing experiment in federalism": Congress's effort to "produce (albeit at some cost and

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[3] 47 U.S.C. §332(c)(7)(B)(iv),(v). Congress separately authorized the agency to make rules regarding RF emissions. Telecommunications Act of 1996, 110 Stat. 56 §704(b).

delay for the carriers) individual solutions best adapted to the needs and desires of particular communities." *Town of Amherst v. Omnipoint Communs. Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

3. In 2008, the wireless industry—led by CTIA-The Wireless Association—filed a petition for a declaratory ruling asking the FCC to, *inter alia*, adopt short, uniform deadlines for State and local action under §332(c)(7). States and local governments, including Petitioners, argued that the FCC had no jurisdiction to issue any ruling under §332(c)(7) other than a ruling related to RF emissions. In 2009, in the Declaratory Ruling, the FCC granted the industry its requested relief in significant part.

a. The FCC ruled that it had authority to implement §332(c)(7) pursuant to four provisions of the Act outside of §332(c)(7)—§§1, 4(i), 201(b), and 303(r). App. 87a (¶ 23). These provisions, with slight variations, generally permit the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. §201(b); App. 87a (¶ 23); the FCC's exercise of authority under these provisions gives rise to remedies under Title IV of the Communications Act, 47 U.S.C. §401 *et seq.*

The FCC claimed that §332(c)(7)(A)—the preservation clause stating that "nothing" else "in this Act" may "limit" or "affect" State and local authority—only forbids the agency from creating additional "limitations" beyond those that the statute enumerates. App. 90a, 134a (¶¶ 25, 64). The FCC did not

explain, however, how §332(c)(7)(A)'s preservation clause allows it to use §§1, 4(i), 201(b), and 303(r) to "affect" State and local authority. It recognized that its ruling did affect local authority, stating, *inter alia*, that State and local governments must act in accordance not only with the statute, but with limitations on local authority "as defined" by the agency. App. 90a (¶ 25).

b. The FCC's Declaratory Ruling adopted two basic rules.

First, the FCC addressed timing issues. Acknowledging a conflict with the standards in particular States and local governments, the FCC adopted national standards defining what constitutes a State or local government's "failure to act" if it does not release a decision within "a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." App. 116a-120a, ¶¶ 46-48. The FCC ruled that absent an applicant's agreement, if a State or local government does not release its decision 90 days after the applicant files a collocation application or within 150 days after the filing of all other applications, it automatically constitutes a "failure to act," and presumptively constitutes an unreasonable "period of time" on the merits. App. 72a, 106a-108a, 111a-112a (¶¶ 4, 37, 42). Unless the applicant agrees otherwise, this forces the State or local government into court on a fixed timetable (regardless of how reasonable its delay may be), and then requires the State or local government to overcome the presumption on the merits by explaining its delay. App. 111a-112a (¶ 42).

The FCC stated that while its policy choice would conflict with those of various States, its choices accommodated reasonable State and local processes "in most instances." App 114a (¶ 44).

- The FCC noted that of the eight State statutes discussed in its record, Connecticut law on its fact authorizes "a longer process" (180 days) than the FCC's rules permit. App. 118a (¶ 48).
- California requires applications to be processed within 60 days, after a 30-day review period for completeness, but only if no environmental review is required. App. 117a (citing Cal. Gov't Code §§65940 & 65943). The FCC chose not to provide for delays for environmental reviews.
- North Carolina has a "collocation" time period of 45 days for processing after a 45-day review period for application completeness, but only if the collocation does not increase the height of the facility. Otherwise, the time for action is tied to the time for action on other land use applications. App. 117a (citing N.C. Code Ann. §153A-349.53). The FCC applied a different test for determining whether the collocation deadline should apply.
- Minnesota requires applications to be processed within 60 days, which can be extended an additional 60 days upon written notice to the applicant. App. 117a (¶ 47, citing Minn. Stat. Ann. §15.99). Under the FCC's rules, times can be extended, but only with the consent of the applicant. App. 122a (¶ 49).

The FCC explained that a State's choice for a longer period for review would not preclude an applicant from suing the State or local government using the FCC's new, shorter timelines. App. 120a (¶ 50) (noting that the applicant "may bring suit under §332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired.").

Neither facet of the FCC's new timing rules—its fixed trigger for judicial review or its presumption against local governments on the merits—existed under §332(c)(7)(B)'s plain terms; the FCC pointed to no court that had adopted them. In addition, because the rules apply to only one class of zoning application (those for the placement of "personal wireless service facilities"), they have the effect of requiring a State or local government to prioritize wireless applications over other zoning matters.

Second, the FCC adopted a ruling under §332(c)(7)(B)(i)(II), which provides that a State or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The agency ruled that a State or local government violates this provision if it denies an application "solely because 'one or more carriers serve a given geographic market.'" App. 127a-128a (¶ 56).

4. On January 14, 2010, the City of Arlington, Texas, filed a petition for review with the Fifth Circuit, which had jurisdiction pursuant to 47 U.S.C.

§402(a) and 28 U.S.C. §2344. The court initially deferred review, then ruled after the FCC considered petitions for reconsideration.[4]

A central question was whether the FCC had jurisdiction to implement §332(c)(7). While the Fifth Circuit expressly acknowledged that this Court had not resolved the issue and that other circuits had adopted conflicting approaches, it ruled that *Chevron* required it to defer to the FCC's own assessment of its jurisdiction. App. 37a. The court recognized that §332(c)(7)(A) limited the FCC's authority, but ruled that if it were ambiguous, the court "must defer" to the FCC's permissible interpretation. App. 40a. The court proceeded to deem the statute ambiguous in various ways. App. 41a-45a. The court reasoned that since the FCC's general authority under these other sections would ordinarily apply to a Communications Act amendment, Congress must "specifically restrict" the agency's general authority, and "clearly remove" the agency's authority to apply these other Act provisions to §332(c)(7). App. 42a.

The Fifth Circuit did not ask whether Congress would intend the FCC to clarify any ambiguity in this jurisdictional provision (or whether the FCC had any special expertise to evaluate zoning decisions); it did not apply any traditional statutory presumptions

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[4] App. 10a. The City of San Antonio, Texas, joined a number of other parties in intervening in support of this petition, and also later filed its own petition for review after the agency's denial of reconsideration.

for interpretations of exceptions; and it did not examine §332(c)(7)(A) in the context of other provisions of the Communications Act, or of §332(c)(7) itself. It proceeded to rule that "none of the cities' arguments convince us that the FCC's interpretation of its statutory authority is impermissible." App. 51a.

Reasons for Granting the Writ

The decision below sharpens a significant divergence among the circuit courts about *Chevron*'s application to an agency's determination of its own jurisdiction. The Fifth Circuit's approach—effectively that statutory ambiguity alone allows an agency to claim broad new authority—raises important questions that this Court should resolve. The court's analysis inverts the doctrine that an agency has only the authority Congress grants it, and contravenes the principles underlying *Chevron*.

This case illustrates the problem with a standard of review that transforms textual ambiguity into a jurisdictional grant. Section 332(c)(7) represented Congress's careful and comprehensive effort to balance the State and local interests in managing land use—a quintessential State function—with the federal interests in encouraging national deployment of wireless facilities. Through this "complex and novel statutory scheme," Congress rejected an FCC-guided "national approach" to zoning, and instead adopted a system of "cooperative federalism." *Rancho Palos Verdes*, 544 U.S. at 123 (Breyer, J., concurring).

Section 332(c)(7)'s language, context, and unusually clear legislative history all indicate that the FCC's role under the statute is not general, but specific: it extends only to a narrow, technical issue (RF-emissions). Yet by applying *Chevron* to defer to the FCC's determination that it has general authority to make rules governing the State and local zoning process under §332(c)(7), the decision below adopts the very "national approach" that Congress considered and rejected. This has significant consequences for State and local governments, including for communities that have made different policy choices about the appropriate time for local review.[5]

I. The Lower Courts Are Divided Over *Chevron's* Application to Jurisdictional Questions.

A. *There Is a Conflict Among the Circuits as to Chevron's Application.*

The Fifth Circuit correctly observed that its decision implicates a circuit conflict:

> The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an

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[5] *See, e.g., supra,* at 9 (discussing Connecticut, California, North Carolina, and Minnesota).

> agency's jurisdiction, some do not, and some circuits have thus far avoided taking a position. In this circuit, we apply *Chevron* to an agency's interpretation of its own statutory jurisdiction.

App. 37a-38a (internal notes omitted). There is little prospect that the conflict will be resolved without this Court's intervention.

1. The Seventh Circuit and Federal Circuit review an agency's determination of its statutory jurisdiction *de novo*. The Seventh Circuit has repeatedly declined to apply a deferential standard to jurisdictional questions. *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999). The court has explained that "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Durable Mfg. Co. v. United States DOL*, 578 F.3d 497, 501 (7th Cir. 2009) (quoting *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990)).[6] The Federal Circuit applies the same standard. *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998).

2. The Fifth Circuit joins the Third, Eighth, and Tenth Circuit at the opposite extreme. These courts

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[6] The Seventh Circuit has recognized that "the Supreme Court has not definitively ruled on the issue." *N. Ill. Steel Supply Co.*, 294 F.3d at 847.

resolve jurisdictional questions by applying *Chevron*; they do not independently analyze Congress's jurisdictional decisions. *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 355 (3d Cir. 2001) citing *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys.*, Inc., 856 F.2d 546, 552 (3d Cir. 1988); *Lyon County Bd. of Comm'rs v. EPA*, 406 F.3d 981, 983 (8th Cir. 2005); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-1146 (10th Cir. 2010).

3. No court's decisions more clearly demonstrate the lower courts' long struggle here than the D.C. Circuit's. While the court has applied *Chevron* to jurisdictional questions, *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994); *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996), it has also declined to do so. *New York Shipping Asso. v. Federal Maritime Com.*, 854 F.2d 1338, 1362-1363 (D.C. Cir. 1988); *N. Am. Van Lines Inc. v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989). In some cases, the court has attempted to draw a distinction based on the nature of the question before it. *See, e.g., Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005) (noting that the FCC's "self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.*, whether the agency acted pursuant to delegated authority."); *accord ACLU v. FCC*, 823 F.3d 1554, 1567 n.32 (D.C. Cir. 1987). Most recently, Judge Janice Rogers Brown authored a concurring opinion in *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 766 (D.C. Cir. 2012), explaining that regardless of the court's "general" rule requiring *Chevron* deference, it is improper on jurisdictional questions that present

"undisputed jurisdictional facts," at least absent "some clear indication from Congress that it has delegated jurisdiction-defining authority."

B. Chevron *Should Not Apply to an Agency's Jurisdictional Determinations.*

Both scholars and this Court's teachings confirm that *Chevron* should not apply automatically to an agency's jurisdictional determinations.

1. Addressing what a leading article has called "the most important—and vexing—question" involving *Chevron*'s domain, many legal scholars have concluded that *Chevron* should not apply when an agency interprets a statute to determine its own jurisdiction.[7] They recognize that a no-deference rule is "implicit in *Chevron*" and follows from the fact that agencies "can act only to the extent that Congress has delegated them the power to do so." Sales, 2009 U. Ill. L. Rev. at 1532; *see also* Merrill, 89 Geo. L.J. at 912-13. The scholars have noted that agencies "have no comparative advantage in reading statutes" over courts; Gellhorn, 20 Cardozo L. Rev. at 1009; that an agency's self-interest "may cloud its judg-

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[7] Thomas W. Merrill, *Chevron's Domain*, 89 Geo. L.J. 833, 909-911 (2009); Nathan A. Sales & Jonathan H. Adler, *The Rest is* Silence: *Chevron Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497 (2009); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1786-87 (2012); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1008-09 (1999); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203 (2004).

ment," *id.*, and that independent judicial review furthers due process and enhances fairness and the perception of fairness. Chapman, 121 Yale L.J. at 1786-87; Armstrong, 13 Cornell J.L. & Pub. Pol'y at 268-285. Perhaps above all else, independent review ensures that Congress's judgments about the scope of an agency's authority will be honored: "Just as foxes should not guard henhouses, agencies should not be entrusted to police the limits on their own regulatory authority." Sales, 2009 U. Ill L. Rev. at 1533.

This case demonstrates that these scholars have it right, at least in cases like this one. Here, the FCC has an interest in facilitating its own policy interests by expanding its jurisdiction. Yet both Petitioners and the FCC agree that Congress intended to limit FCC authority in some respects; the question is how much. Resolving this pure legal issue does not touch on the agency's specialized or technical expertise over communications matters. Yet reading *Chevron* to grant the agency discretion to make the jurisdictional determination essentially allows the agency to re-balance Congress's careful statutory structure to further its own interests.

2. While this Court has not definitely resolved the issue, its cases at least suggest that the Fifth Circuit approach—mechanically deferring to agency jurisdictional determinations unless Congress has "clearly removed" the authority to make those determinations— as highly questionable.

a. Pre-*Chevron*, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), the Court re-

fused to defer to a statutory interpretation of the Administrator of the Fair Labor Standards Act because "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Id.* at 616; *see also Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) (deciding the limits of agency authority is a judicial function.").

b. In *Chevron* itself, jurisdiction was not in doubt. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The decision does, however, shed important light on the scope of the doctrine it announced. *Chevron* concerned a provision of the Clean Air Act that required certain States to establish a permit program regulating "stationary sources" of air pollution. *Id.* at 840. The EPA defined "stationary source" plantwide, rather than adopting a definition tied to each pollution-emitting device at a plant. *Id.* at 856. Reviewing the agency's order, the D.C. Circuit decided that the purposes of the non-attainment program required it to set-aside the agency's policy choice. *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982).

Adopting its now well-known test,[8] the Court reversed, and upheld the EPA's rule. *Id.* at 728. The Court explained that it had applied this deferential approach whenever the "meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge." *Id.* at 844. As discussed above, however, discerning the limits of an agency's jurisdiction involves a purely legal, not a policy, question that does not implicate agency expertise.

c. In *Chevron*'s immediate aftermath, individual Justices disputed whether the Court's deference on this policy question should also extend to basic questions of the agency's own jurisdiction, particularly where the issue does not turn on matters within an agency's expertise.

In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380-82 (1988), Justice Scalia wrote a

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[8] *Chevron, U.S.A., Inc.*, 467 U.S. at 842-843 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (internal footnotes omitted).

concurring opinion claiming that *Chevron*'s "rule of deference applies even to an agency's interpretation of a statute designed to confine its authority" because there is no "discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Id.* at 381.

Justice Brennan disagreed. *Id.* at 387. He explained that "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction." *Id.* Instead, he said that "[o]ur agency deference cases have always been limited to statutes the agency was 'entrusted to administer'" and "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies." *Id.* He explained that the normal reasons for agency deference do not apply in this setting.

d. While the Court has still not resolved this fundamental debate, it has established that a court does not owe *Chevron* deference automatically, or "merely because [a] statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Instead, a court must first scrutinize whether "the agency's generally conferred authority and other statutory circumstances" make apparent "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001);

Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 714 (2011).[9]

* * *

The Fifth Circuit's automatic application of *Chevron* to the FCC's interpretation of this statutory limit on its authority cannot be squared with *Mead*, which requires a more searching examination of Congress's intent, particularly "where an unusually basic legal question is at issue." *NCTA v. Brand X Internet Servs.*, 545 U.S. at 1004 (2005) (Breyer, J., concurring); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Had the Court considered the jurisdictional issue *de novo* (as at least the Seventh and Federal Circuits would), or engaged in a more careful and searching examination of the statute, the court would have found that the FCC lacks authority to adopt the Declaratory Ruling. *See, infra*, Part II.

II. Applying *Chevron* Led the Court To Expand the FCC's Authority and To Upset Congress's Careful Jurisdictional Balance.

Under the Fifth Circuit's analysis of whether §332(c)(7)(A) bars the FCC from using its general authority in the Act to regulate the State and local siting process under §332(c)(7), *Chevron* deference played a decisive role.

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[9] *See also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 182 L. Ed. 2d 746, 759 (2012) (Scalia, J., concurring) (noting that "a pre-*Chevron* determination that language is ambiguous does not alone suffice; the pre-*Chevron* Court must in addition have found that Congress wanted the particular ambiguity in question to be resolved by the agency.")

1. Because the court accorded *Chevron* deference to the FCC's jurisdictional determination, it did not seek the statute's best reading; it asked only whether the FCC's interpretation was permissible. The court deemed the statute ambiguous in various ways,[10] then applied *Chevron*'s second step to rule that "none of the cities' arguments convince us that the FCC's interpretation of its statutory authority is impermissible." App. 51a.

2. If the court had itself conducted a complete statutory analysis applying traditional tools of statutory construction, it would have found that Congress did not intend for the FCC to make policy affecting State and local authority in this area.

a. Section 332(c)(7)'s subject matter (local land use processes) and the entities that implement these processes (State and local governments) are not the subjects of the Communications Act. 47 U.S.C. §152. The FCC has no experience in managing zoning, nor is there an obvious national standard to which the agency could look (or did look) in deciding how much time is required to process applications in particular States or local communities. It is unlikely that Congress would authorize the FCC to intrude into

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[10] App. 41a (§332(c)(7)(A) does not "unambiguously preclude" FCC action); App. 41a ("§332(c)(7)(A) itself does not provide a clear answer"); App. 42a (issue "remains unresolved"); App. 42a (noting that Congress "did not clearly remove" FCC's ability to implement §332(c)(7)(A)); App. 42a-43a (Congress's "silence" leaves §332(c)(7)(A)'s effect on the FCC's authority to administer §332(c)(7)(B)'s limitations ambiguous) App. 43a (noting that "one could read" §332(c)(7)(A) as the FCC does).

these areas without saying so expressly. Yet rather than say so expressly, Congress granted the FCC authority to act in one area (RF emissions) while granting the courts exclusive jurisdiction to address all other disputes arising under §332(c)(7).

b. The consequence of FCC regulation of State and local land use processes is significant, as this case illustrates. If the FCC deadlines pass (without extension by mutual agreement), an applicant must file a complaint within 30 days, triggering expedited judicial review. The State or local government's decision is presumptively unreasonable, and the State or local government must expend resources to defend its action. It must do so even if (to take an example) the time was required to comply with State environmental laws or to implement other policies reflected in State and local deadlines. *See, supra*, at 9 (discussing State laws). The review and the expense are triggered not because the State and local policies are unreasonable, but because the FCC created a federal zoning policy. That is something that the courts could not do, and have never done under their case-specific approach to §332(c)(7).

It is unlikely that Congress intended to undercut State and local laws without some indication it intended to do so. Congress's emphasis on judicial review in §332(c)(7), while not determinative, certainly cuts against finding that Congress intended the FCC to establish federal policies in this area. Likewise, the conference report explains that §332(c)(7)(B)(ii)'s requirement that a local government act within a "reasonable period of time" is not intended "to give preferential treatment to the

personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable" zoning time frames. H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). Yet, even if no cases are actually filed, the inevitable effect of a policy that threatens States and local governments with litigation if they do not meet FCC deadlines is that State and local governments must give precedence and special treatment to wireless applicants at the expense of other zoning applicants and policies.

2. a. Read in this context, the plain language of §332(c)(7)(A)'s preservation clause is clear: it prevents any other provision of the Communications Act from "affect[ing]" or "limit[ing]" State or local authority. Section 332(c)(7), it follows, is both comprehensive and self-contained: the FCC may act where §332(c)(7) gives it a role (to address RF matters), but not elsewhere. The FCC therefore may not use §§1, 4(i), 201(b), and 303(r) to assert jurisdiction over State and local zoning processes with respect to matters that are addressed in §332(c)(7), *e.g.*, to define what constitutes "substantial evidence," what constitutes a "written record," what constitutes a "reasonable time" for action, and so on. As the FCC itself recognized, its use of §§1, 4(i), 201(b), and 303(r) to create national standards necessarily "affects" and is intended to "affect" State and local authority. App. 90a (¶ 25) (noting that State and local governments must comply with §332(c)(7) "as defined herein"); *see also* App. 133a (¶ 62) (noting that certain State and local decisions are "unaffected" by its Declaratory Ruling).

b. The FCC's reading cannot be squared with §332(c)(7)(A)'s plain language. The FCC contends that §332(c)(7)(A)'s preservation clause only forbids it from creating "additional limitations" beyond those enumerated in §332(c)(7)(B). The agency therefore concludes that it may use §§1, 4(i), 201(b), and 303(r) to establish national rules for local zoning that are binding on States, local governments, and the courts, if the rules relate to some matter mentioned in §332(c)(7)(B). Pet. App. 87a-91a (¶¶ 23-25). But the "limits" created by the FCC's rules—the specific federal deadlines—are "additional limitations" that appear nowhere in the Act. Moreover, the FCC's claim that the statute only prevents it from creating additional "limits" reads the word "affect" out of the statute. By selecting its preferred reading of §332(c)(7) to advance its own policies, the FCC necessarily affects State and local authority. Indeed, the agency's creation of an overriding federal standard "independent" of state standards, see *supra*, has an additional "[e]ffect" on State law beyond the court review contemplated by §332(c)(7) itself. Likewise, the agency's presumption that State and local governments have acted unreasonably—which appears nowhere in §332(c)(7)'s text—"affects" State and local authority.

The FCC's reading of §332(c)(7) cannot be justified simply because §332(c)(7) appears in the Communications Act, which the FCC generally implements. The Court's decision in *Louisiana PSC v. FCC*, 476 U.S. 355, 373 (1986) is analogous, and to the contrary. The case concerned a preservation clause stating that "except as provided" in certain

sections, "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to" certain matters related to intrastate service. The Court ruled that this clause forbids the FCC from using another Act provision (47 U.S.C. §220) to preempt intrastate depreciation practices. The Court explained that the "nothing in this Act" clause "fences off" intrastate matters "from FCC reach or regulation." *Id.* at 370. Likewise, §332(c)(7)(A) fences off State and local authority from "limits" or "affects" caused by §§1, 4(i), 201(b), and 303(r)—and by any other provision of the Act.[11]

Unless §332(c)(7) is read to have this "fencing off" effect, it is hard to imagine its purpose. If Congress had added §332(c)(7)'s limitations to the Act without the "nothing in this Act" language, the FCC could still only implement the limitations that Congress established; it could not create new ones out of whole cloth. The FCC (and Fifth Circuit applying *Chevron*) thus reads §332(c)(7) as if the limiting language did not exist. Tellingly, the FCC (and the Fifth Circuit) found support for the FCC's action in the Sixth Circuit's decision in *Alliance v. Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). There, the court

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[11] The Fifth Circuit seems to have found it significant that the Congress did not use the phrase "jurisdiction" in Section 332(c)(7)(A). App. 42a n.104. However, the logical reading of Section 332(c)(7) is that it is broader, not narrower than the clause at issue in *Lousiana PSC*, and seals off an entire subject matter area from FCC action, direct or indirect. By contrast, in *Lousiana PSC*, no one doubted that the FCC had authority to address depreciation practices, so long as it did not assert jurisdiction over intrastate depreciation rates.

found that the FCC could rely on its general rulemaking authority to implement §621(a)(1) of the Communications Act, a provision that contains *no* language limiting the applicability of "other provisions" of the Communications Act. 47 U.S.C. §541(a)(1).

The Fifth Circuit's approach here misconstrues the Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). *AT&T* endorsed Justice Breyer's recognition that "'Congress enacted [the] language [of §201(b)] in 1938,' and . . . whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute *depends upon what that later enacted statute contemplates*.' *AT&T Corp.*, 525 U.S. at 420 (emphasis added); *id.* at 378 n.5 (finding Justice Breyer's statement "assuredly true."). Section 332(c)(7)(A) indicates what it "contemplates" expressly: nothing in this Act" may "limit" or "affect" the State and local authority that §332(c)(7) addresses. That Congress may enact such a limitation is well-established: "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *La. Pub. Serv. Comm'n*, 476 U.S. at 374-75. Requiring Congress to do more to shield an area from FCC policymaking—as the Fifth Circuit would—turns this fundamental principle on its head.

c. Other interpretive tools indicate that Congress intended to prevent the FCC from adopting national regulations to implement §332(c)(7).

First, Petitioners' statutory interpretation has direct support in the statute's legislative history; the FCC's has none. As explained, Congress rejected a provision that would have granted the FCC the very authority it exercised here in favor of §332(c)(7). The conference report directs that the FCC must terminate "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities." H.R. Rep. No. 104-458 at 207-208 (1996) (Conf. Report).

Second, this Court has indicated that courts should avoid statutory interpretations that would render other statutory language superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The FCC's reading defies this canon. If the FCC is correct that Congress intended and expected the FCC to use §§1, 4(i), 201(b), and 303(r) to address any matter mentioned in §332(c)(7), the specific grant of authority to the FCC to address RF issues in §332(c)(7)(B) is surplusage.

Third, this Court has instructed that "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). The FCC's interpretation defies this canon. It requires a court to read the "except as provided in this paragraph" broadly so that State and local authority may be "limit[ed]" and "affect[ed]" not only by the language "provided" in §332(c)(7)(B), but also by the

FCC's implementation of this provided language using §§1, 4(i), 201(b), and 303(r).

Finally, the Fifth Circuit's approach—requiring an unambiguous statement of Congressional intent—requires it to ignore basic presumptions that this Court has established. This Court has adopted a presumption against preemption instructing that a court must "begin . . . 'with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria Group Inc. v. Good*, 555 U.S. 70, 77 (2008), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). This assumption "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* This presumption supports Petitioners'—not the FCC's—interpretation, because only Petitioners' reading would prevent federal preemption by agency action where it is not Congress's "clear and manifest" intent.

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In sum, the court's resolution of this case turned on its abbreviated and piecemeal *Chevron* analysis, and its deference to an FCC jurisdictional determination that is inconsistent with the best reading of §332(c)(7) considered as a whole. Review is appropriate to ensure that §332(c)(7) is applied as Congress intended.

III. This Case Allows the Court To Settle Recurring Issues of National Importance.

This case presents recurring issues with serious national ramifications both as a matter of administrative law, and under the Communications Act.

1. As a matter of administrative law, it is critical that the Court clarify the recurring issue of whether and how *Chevron* applies when an agency determines its own statutory jurisdiction. This very issue is central in other important cases now pending in the courts. *See, e.g.*, Daniel A. Lyons, *Tethering the Administrative State: The Case Against Chevron Deference for FCC Jurisdictional Claims*, 36 Iowa J. Corp. L. 823 (2011) (discussing FCC's claim of authority over the Internet).

But deferring to an agency's jurisdictional conclusion is especially intolerable when the courts of appeals fail to do so uniformly. This permits an agency's jurisdictional claim and ensuing rules to be binding in one circuit but not in others—a result especially problematic because agency cases are often assigned to courts of appeals randomly. 28 U.S.C. §2112. This creates a patchwork of "federal" rules, where results are determined by lottery. This case presents a particularly strong vehicle for resolving this issue given the strong indicia of Congress's intent, and the non-technical, purely legal nature of the jurisdictional issue.

2. Resolving the FCC's proper role with respect to §332(c)(7) is of continuing and growing importance.

Allowing the FCC to interject itself into local zoning processes and to make every local government subject to federally-established zoning rules has a direct effect on State and local governments. The effect is legal (States and their processes would be subject to federal administrative regulation); financial (federal rules and processes increase costs and raise the spectre of increased litigation); and consequential (the federal rules necessarily require local governments that wish to avoid litigation to give precedence to wireless zoning applications over other applications). In *Rancho Palos Verdes*, these factors were significant in determining that a §1983 remedy was inconsistent with §332(c)(7)'s statutory scheme. These factors also warrant granting the petition here, to maintain Congress's balance.

The issue is likely growing in importance. The cellular industry estimates that there were approximately 10,000 cell sites at year end 2002. By year end 2010, the number of cell sites had grown to approximately 253,000, and the number continues to grow—about 30,000 sites were added between 2010 and year end 2011.[12] The wireless industry has already returned to the FCC and asked it to adopt

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[12] CTIA's Semi-Annual Wireless Industry Survey, *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf (last accessed June 26, 2011); *see also In re Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Mobile Services, Fifteenth Report*, WT Docket No. 10-133, FCC 11-103 at ¶ 310 (June 27, 2011) (noting that one provider alone, Verizon, would need to add between 17,400 and 27,400 sites to its network).

stricter rules. The agency recently released a far-reaching Notice of Inquiry aimed at "[i]mproving policies [r]egarding . . . [w]ireless [f]acilities [s]iting." *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, 26 FCC Rcd. 5384 (2011). The FCC cited the Declaratory Ruling (¶¶ 13, 48 n.45), and stated its belief that "the Commission has broad general rulemaking authority that would allow it to issue rules interpreting section[ ] . . . 332." *Id.* at ¶ 57; *see also id.* at ¶ 51. Therefore, the FCC is likely to use the Fifth Circuit's decision to assert broad and sweeping authority to regulate all types of State, local, and private property.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 27, 2012

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60039

CITY OF ARLINGTON, TEXAS; CITY OF SAN ANTONIO, TEXAS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

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Before DAVIS, PRADO, and OWEN, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

The City of Arlington, Texas and the City of San Antonio, Texas seek review of a Declaratory Ruling and subsequent Order on Reconsideration that the Federal Communications Commission (FCC or Commission) issued in response to a petition for a declaratory ruling by a trade association of wireless telephone service providers, CTIA—The Wireless Association® (CTIA). In the proceeding before the FCC, CTIA sought clarification of Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended,[1] regarding local review of wireless facility

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[1] 47 U.S.C. §§ 253, 332(c)(7).

siting applications. We deny Arlington's petition for review on the merits. We dismiss San Antonio's petition for review because we lack jurisdiction to consider it.

I

As part of the Telecommunications Act of 1996 (TCA or the Act),[2] Congress amended the Communications Act of 1934 by adding Section 332(c)(7). That provision, codified as 47 U.S.C. § 332(c)(7), restricts the authority of state and local governments with respect to decisions regarding the placement and construction of wireless communications facilities. It provides:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

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[2] Pub. L. No. 104–104, 110 Stat. 56.

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities

> comply with the Commission's regulations concerning such emissions.
>
> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Section 332(c)(7) seeks to reconcile two competing interests—Congress's desire to preserve the traditional role of state and local governments in regulating land use and zoning and Congress's interest in encouraging the rapid development of new telecommunications technologies by removing the ability of state and local governments to impede the construction and modification of wireless communications facilities through delay or irrational decisionmaking.[3] Section 332(c)(7)(A), by providing that

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[3] *See City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) ("Congress enacted the [TCA] to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies. One of the

"nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," acts to protect state and local government authority. Section 332(c)(7)(B), on the other hand, imposes "several substantive and procedural limitations that subject [state and local governments] to an outer limit upon their ability to regulate personal wireless services land use issues."[4]

In 2008, CTIA filed a petition for a declaratory ruling with the FCC in which it requested that the FCC clarify certain provisions of the Communica-

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means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." (internal quotation marks and citations omitted)); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty., Kan. City, Kan.*, 546 F.3d 1299, 1306 (10th Cir. 2008) ("Congress adopted the TCA in order to promote competition and higher quality in telecommunications services and to encourage the rapid deployment of new telecommunications technologies. The TCA furthered these goals by reducing the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities such as cell phone towers, and by protecting against irrational or substanceless decisions by local authorities." (internal citations and quotation marks omitted)).

[4] *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001) (internal quotation marks and citations omitted); *see also U.S. Cellular Corp. v. City of Wichita Falls, Tex.*, 364 F.3d 250, 253 (5th Cir. 2004) (observing that § 332(c)(7)(B) imposes substantive and procedural limits on local governments' exercise of zoning authority).

tions Act of 1934, including several of § 332(c)(7)(B)'s limitations. The petition asserted that ambiguities in the statute had allowed local governments to impede the placement and construction of wireless facilities, harming consumers' access to wireless services. CTIA's petition made four specific requests.

First, CTIA requested that the FCC provide guidance on what constitutes a "failure to act" for purposes of § 332(c)(7)(B)(v). The FCC was requested to clarify the time periods within which a state or locality must act on wireless facility siting applications. The petition suggested that the Commission find that there has been a failure to act if there is no final action within 45 days from the submission of a wireless facility application and within 75 days from submission of other wireless siting facility applications.

Second, CTIA asked the FCC to find that, in the event no final action was taken within the suggested 45- and 75-day time periods, the application would be deemed granted. Alternatively, CTIA proposed that the FCC establish a presumption that, if a zoning authority could not explain a failure to act within the time frames, a reviewing court should find a violation of § 332(c)(7)(B)(ii) and issue an injunction granting the underlying application.

Third, CTIA requested that the FCC interpret § 332(c)(7)(B)(i), which bars state and local governments from taking action that would "prohibit or have the effect of prohibiting the provision of per-

sonal wireless services."[5] CTIA noted that federal courts had split on the question of whether that provision prevented state and local governments from barring entry of additional wireless service providers into a given market based solely on the existence of another provider within that market.[6] CTIA suggested that the FCC declare that the existence of one or more other carriers in a given geographic market is not by itself a sufficient defense against a suit seeking to enforce § 332(c)(7)(B)(i)(II).

Fourth and finally, CTIA requested the FCC to declare that the TCA preempts any ordinance that automatically requires a wireless carrier to seek a variance, regardless of the type and location of the wireless siting proposal. As support for this request, CTIA pointed to 47 U.S.C. § 253, which provides in pertinent part: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[7]

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[5] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[6] *Compare, e.g.*, *Metheny v. Becker*, 352 F.3d 458, 461 n.2 (1st Cir. 2003) (observing that in the First Circuit "a provider is not precluded from obtaining relief under the Act simply because some other provider services the gap in question"), *with AT&T Wireless PCS, Inc. v. City Council of City of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (concluding that the statute "only applies to 'blanket prohibitions' and 'general bans or policies,' not to individual zoning decisions").

[7] 47 U.S.C. § 253(a).

The FCC issued a public notice seeking comment on CTIA's petition, and the record reflects that, in response to the notice, the FCC received dozens of comments from wireless service providers, local zoning authorities, and other interested parties. In 2009, the FCC issued the Declaratory Ruling, in which it granted in part and denied in part CTIA's petition.[8]

With respect to CTIA's request that the FCC establish time frames in which state and local governments must act on zoning requests, the FCC declared that "a reasonable period of time" for purposes of § 332(c)(7)(B)(ii) presumptively would be 90 days for personal wireless service facility siting applications requesting collocations[9] and 150 days for all other applications.[10] The FCC further determined that a lack of decision within these time frames would constitute a failure to act under § 332(c)(7)(B)(v).[11] The FCC stated, however, that personal wireless service providers and state or local governments could, by mutual consent, extend the prescribed time frames.[12] In addition, the FCC concluded that, if an applicant submits an incomplete application, the time it takes for the applicant to respond to a state or local government's request for

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[8] 24 FCC Rcd. 13994 (2009).

[9] Collocations involve modifications to already existing wireless facilities.

[10] 24 FCC Rcd. 13994 ¶ 32 (2009).

[11] *Id.*

[12] *Id.* at ¶ 32.

additional information would not count toward the 90- or 150-day time frame if the state or local government notified the applicant that the application was incomplete within 30 days of receiving the application.[13]

The FCC rejected CTIA's proposal that the FCC deem as granted applications on which final action was not taken within the prescribed time frames.[14] The FCC observed that § 332(c)(7)(B)(v)'s provision for a cause of action in a court of competent jurisdiction based on a state or local government's "failure to act" indicated Congress's "intent that courts should have the responsibility to fashion appropriate case-specific remedies."[15] Accordingly, the FCC concluded that, although the 90- and 150-day time frames established by the Declaratory Ruling were presumptively reasonable, state or local authorities would have the opportunity in any given case to rebut that presumption in court.[16]

Finally, the FCC addressed CTIA's request that the FCC interpret § 332(c)(7)(B)(i) and 47 U.S.C. § 253. With respect to § 332(c)(7)(B)(i), the FCC determined "that a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged

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[13] *Id.* at ¶ 53.

[14] *Id.* at ¶ 39.

[15] *Id.*

[16] *Id.* at ¶ 42.

in unlawful regulation" that violates § 332(c)(7)(B)(i)(II)'s prohibition on regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services."[17] With respect to § 253, the FCC rejected CTIA's request that the FCC should rely upon that provision to preempt state laws and local ordinances that require wireless service providers to obtain a variance before siting facilities.[18] The FCC noted that CTIA was not seeking the preemption of any particular ordinance and "that any further consideration of blanket variance ordinances should occur within the factual context of specific cases."[19]

Several organizations subsequently filed a petition for reconsideration, which the FCC ultimately rejected in its Reconsideration Order. After the FCC issued the Declaratory Ruling, but before it issued the Reconsideration Order, the City of Arlington filed a petition for review of the Declaratory Ruling in this court. We issued an order holding Arlington's petition for review in abeyance pending the outcome of the above-referenced petition for reconsideration. After the FCC issued the Reconsideration Order, the City of San Antonio, which had also intervened in support of Arlington's petition for review, filed its own petition seeking review of both the Declaratory Ruling and the Reconsideration Order. We have also

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[17] *Id.* at ¶ 55.

[18] *Id.* at ¶ 67.

[19] *Id.*

allowed several parties to intervene in support of or in opposition to the petitions.

II

We first address an issue involving this court's jurisdiction. As we noted above, this case involves two separate petitions for review—Arlington's petition and San Antonio's petition. Many of the issues Arlington and San Antonio raise are the same. Both cities claim (1) the FCC lacked statutory authority to establish the 90- and 150-day time frames; (2) the FCC's 90- and 150-day time frames conflict with the language of § 332(c)(7)(B)(ii) and (v); (3) the FCC's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; and (4) the FCC violated the Administrative Procedure Act (APA) because its establishment of the 90- and 150-day time frames constituted a rulemaking subject to the APA's notice-and-comment requirements.

Each city also raises issues unique to its own petition. Arlington raises a procedural due process claim. San Antonio presents two additional issues: (1) a challenge to the FCC's interpretation of § 332(c)(7)(B)(i), and (2) a claim that the FCC failed to comply with the Regulatory Flexibility Act.[20] The FCC contends, however, that we lack jurisdiction to consider San Antonio's additional arguments because San Antonio did not timely file its petition for review. Before we address the merits of the cities'

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[20] 5 U.S.C. § 601 *et seq.*

arguments, we must address the issue of our jurisdiction.

A

San Antonio filed its petition for review pursuant to 47 U.S.C. § 402(a), which provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." Chapter 158 of Title 28 grants this court jurisdiction over "all final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47."[21] Chapter 158 also states that a party seeking review of "a final order reviewable under this chapter" must file a petition for review of the order within 60 days after entry of the order.[22] This 60-day period "'is jurisdictional and cannot be judicially altered or expanded.'"[23]

The FCC issued the Declaratory Ruling on November 18, 2009. Arlington filed its petition for review of the Declaratory Ruling on January 14, 2010, within the 60-day period set forth in 28 U.S.C. § 2344. We have jurisdiction to consider that petition and the issues Arlington raises. San Antonio, however, did not file its petition until October 1, 2010, well beyond the expiration of the 60-day period. Nev-

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[21] 28 U.S.C. § 2342(1).

[22] *Id.* at § 2344.

[23] *Brazoria Cnty., Tex. v. EEOC*, 391 F.3d 685, 688 (5th Cir. 2004) (quoting *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985)).

ertheless, San Antonio argues that its petition for review of the Declaratory Ruling is timely because it was filed within 60 days of the FCC's issuance of the Reconsideration Order.

It is the general rule that filing a petition for reconsideration with the FCC will toll the 60-day period for filing a petition for review of the agency's action in this court.[24] As the FCC notes, however, San Antonio did not file a petition for reconsideration of the Declaratory Ruling. Rather, other parties affected by the Declaratory Ruling filed the petition for reconsideration that culminated in the Reconsideration Order, and San Antonio simply submitted comments in support of that petition. The issue here, then, is whether a petition for reconsideration filed by one party to an agency action tolls § 2344's 60-day period for a party that did not file its own petition for reconsideration.

We conclude that a petition for reconsideration filed by one party does not toll § 2344's 60-day period for parties that do not file petitions for reconsideration. We reach this decision because "finality with respect to agency action is a party-based concept."[25] It is well-established that "a petition for

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[24] *See Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 596-97 (D.C. Cir. 1997); *Pellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party.").

[25] *Bellsouth Corp.*, 17 F.3d at 1489 (internal quotation marks and citations omitted); *see also W. Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1988) ("[A]n agency action can be final

agency reconsideration by one party does not affect the right of other parties to seek judicial review."[26] In other words, the petition for reconsideration filed in this case did not affect San Antonio's right to file a petition for review in this court as of the date the FCC issued the Declaratory Ruling, and we would have been able to exercise jurisdiction over such a petition for review so long as San Antonio itself did not file a petition for reconsideration. Because "there is no principled way to distinguish between the concept of finality for purposes of triggering the running of a time limit for appeals and the concept of finality for the purpose of appellate court jurisdiction,"[27] we conclude that San Antonio's failure to petition for reconsideration of the Declaratory Ruling rendered the Declaratory Ruling a final agency decision with respect to San Antonio both for purposes of conferring jurisdiction on this court and for purposes of triggering § 2344's time period. San Antonio thus

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for one party and nonfinal for another."); *Winter v. ICC*, 851 F.2d 1056, 1062 (8th Cir. 1988) ("[I]n multi-party proceedings one party may seek judicial review of an agency decision while another party seeks administrative reconsideration, resulting in both tribunals having jurisdiction. An agency decision may thus be final for one purpose yet nonfinal for another purpose.").

[26] *Cal. Dep't of Water Res. v. FERC*, 361 F.3d 517, 521 (9th Cir. 2004); *see also W. Penn Power Co.*, 860 F.2d at 586 ("It is well established, for example, that when two parties are adversely affected by an agency's action, one can petition for reconsideration before the agency at the same time that the other seeks judicial redetermination.").

[27] *W. Penn Power Co.*, 860 F.2d at 585-86.

had 60 days from November 18, 2009, to file a petition for review in this court of the Declaratory Ruling. The city did not file its petition until October 1, 2010, months after its 60-day period to file a petition for review had expired, and we lack jurisdiction to consider the petition insofar as it challenges the Declaratory Ruling.

B

San Antonio also argues we can consider its petition, notwithstanding the fact that it was untimely with respect to the Declaratory Ruling, because the petition also challenges the FCC's Reconsideration Order. There is no doubt that San Antonio's petition for review is timely insofar as it challenges the FCC's Reconsideration Order. The Reconsideration Order is not a reviewable order, however, because it merely denied rehearing of matters decided in the Declaratory Ruling. It contained no new or additional determinations. San Antonio did not petition for reconsideration of the Declaratory Ruling, and in such a situation, San Antonio cannot challenge the rulings in the Declaratory Order by challenging only the Reconsideration Order. As the Supreme Court explained in *ICC v. Brotherhood of Locomotive Engineers*: "where a party petitions an agency for reconsideration on the ground of 'material error,' *i.e.*, on the same record that was before the agency when it rendered its original decision, 'an order which merely denies rehearing of . . . [the prior] order is not itself reviewable.'"[28] Here, the argu-

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[28] 482 U.S. 270, 280 (1987) (quoting *Microwave Commc'ns, Inc. v. FCC*, 515 F.2d 385, 387 n.7 (D.C. Cir. 1974)).

ments San Antonio raises in its petition for review, and the arguments it submitted in support of the petition for reconsideration, all were originally presented to the agency during the proceedings leading up to the issuance of the Declaratory Ruling. Accordingly, in addition to lacking jurisdiction to review San Antonio's petition insofar as it challenges the Declaratory Ruling, we also lack jurisdiction to consider the petition as a challenge to the Reconsideration Order.

C

San Antonio maintains that we can consider all of its arguments, even if we lack jurisdiction over its petition for review, because it intervened in support of Arlington's timely petition for review in this court. Our precedent compels us to disagree. In *Brazoria County, Texas v. EEOC*,[29] we held that a party could not rely on her timely intervention with respect to another party's petition for review to raise matters outside the scope of the other party's petition.[30] We arrived at this holding because motions to intervene must be filed within 30 days after filing of the petition for review[31] —which itself must be filed within 60 days after the agency's final action[32]—thus creating a situation in which intervenors can request review of issues as late as 90 days after the agency's

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[29] 391 F.3d 685 (5th Cir. 2004).

[30] *Id.* at 688-89.

[31] *See* Fed. R. App. P. 15(d).

[32] 28 U.S.C. § 2344.

final action. Because permitting an intervenor to raise additional issues for review would contravene § 2344's 60-day time period for filing petitions for review, we observed that intervenors "are bound by the issues raised in the petitions for review."[33] Thus, we generally limit intervenors to raising arguments addressing only those issues presented in the petitions for review.[34]

As discussed above, Arlington has raised five issues. San Antonio's argument that the FCC failed to comply with the Regulatory Flexibility Act and its challenge to the FCC's interpretation of § 332(c)(7)(B)(i) do not relate to those issues, and we lack jurisdiction to consider them. Accordingly, we will limit our discussion to only those issues Arlington has raised. We will, however, consider the arguments of San Antonio and other intervenors that relate to those issues.

III

The cities contend the FCC violated the APA when it established the 90- and 150-day time frames. The APA identifies three types of agency proceedings—rulemaking, adjudication, and licensing—and

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[33] *Brazoria Cnty., Tex.*, 391 F.3d at 689 (quoting *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 437 (5th Cir. 1987)).

[34] *Id. But see Kan. City S. Indus., Inc. v. ICC*, 902 F.2d 423, 434-35 (5th Cir. 1990) (exercising jurisdiction over an issue raised by an intervenor when the intervenor "filed its motion for leave to intervene in the proceedings in this Court not only within Rule 15(d)'s thirty-day filing requirement for intervention motions but also within section 2344's sixty-day filing requirement for petitions for review of ICC orders").

prescribes specific procedures applicable to those proceedings.[35] When an agency engages in rulemaking it must, subject to certain statutory exceptions, satisfy the APA's familiar notice-and-comment requirements.[36] Adjudications, by contrast, are not subject to those requirements.[37] The cities argue the FCC violated the APA because the time frames constitute new rules subject to the APA's notice-and-comment requirements for rulemaking and the FCC failed to comply with the those requirements.

The FCC makes two arguments in response. First, the FCC notes the Declaratory Ruling was the product of adjudication, not rulemaking, and thus was not subject to the APA's notice-and-comment requirements. Alternatively, the FCC suggests that any new rules included in the Declaratory Ruling were interpretive rules excepted from the notice-and-comment requirements.

A

We first consider whether the 90- and 150-day time frames were not subject to the APA's notice-and-comment requirements because the Declaratory Ruling was the product of adjudication rather than rulemaking. It is well-established that agencies can choose to announce new rules through adjudication

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[35] *See Sierra Club v. Peterson*, 185 F.3d 349, 366 (5th Cir. 1999).

[36] 5 U.S.C. § 553.

[37] *Id.* at § 554; *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001) ("There is no notice and comment requirement for an agency adjudication.").

rather than rulemaking.[38] Agencies typically enjoy "very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking."[39] The notice-and-comment requirements for rulemaking would ordinarily not apply to the FCC's decision to establish the time frames if the FCC exercised its discretion to issue the Declaratory Ruling pursuant to its adjudicative powers.

We examine two aspects of an agency action when determining whether an agency action was a rulemaking or an adjudication. First, we consider the agency's characterization of its own action.[40] Second, we must examine the ultimate product of the agency action.[41] Both of these considerations

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[38] *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (observing that an agency "is not precluded from announcing new principles in an adjudicative proceeding"); *Mobil Exploration & Producing N. Am., Inc. v. FERC*, 881 F.2d 193, 198 (5th Cir. 1989) (stating that an agency "may establish rules of general application in either a statutory rulemaking procedure or an individual adjudication").

[39] *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001); *see also Bell Aerospace Co.*, 416 U.S. at 294 (observing that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy.").

[40] *Am. Airlines, Inc.*, 202 F.3d at 797.

[41] *Id.*

lead us to agree with the FCC that the Declaratory Ruling was the result of an adjudication and not a rulemaking.

First, the FCC itself claims it was engaging in adjudication when it issued the Declaratory Ruling. As we have previously recognized, we "accord significant deference to an agency's characterization of its own action."[42] This deference is not absolute, however. Otherwise, an agency would be able to escape the APA's notice-and-comment requirements simply by labeling a rulemaking an adjudication.[43] Whether the FCC's action here constituted an adjudication or a rulemaking ultimately turns on the attributes of the Declaratory Ruling itself.

The Declaratory Ruling is designated as a "Declaratory Ruling," and it was issued pursuant to 47 C.F.R. § 1.2. Section 1.2 grants the FCC the power to issue declaratory orders and is derivative of § 554(e) of the APA.[44] Section 554(e) provides: "The

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[42] *Id.*

[43] *Cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.").

[44] C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."); *see also Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 n.4 (9th Cir. 1996) ("Because 5 U.S.C. § 554(e) grants the FCC authority to issue 'declaratory orders,' and because 47 C.F.R. § 1.2 is derived from § 554(e), it appears that the terms 'declaratory order' and 'declaratory

agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." Because § 554(e) is a subsection of the provision in the APA governing formal adjudication, we have held that declaratory rulings issued pursuant to its grant of authority are informal adjudications under the APA.[45] We see no reason to treat the Declaratory Ruling differently: it was the product of adjudication.[46]

B

Our conclusion that the Declaratory Ruling resulted from adjudication does not end our review of the FCC's purported non-compliance with the APA. Although, as noted above, agencies enjoy broad discretion in choosing whether to establish a rule

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ruling' are used interchangeably.").

[45] *See Am. Airlines, Inc.*, 202 F.3d at 796-98 (treating a declaratory order issued pursuant to § 554(e) as an informal adjudication); *Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) (same); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("[T]here is no question that a declaratory ruling can be a form of adjudication." (internal citation omitted)).

[46] *See Am. Airlines, Inc.*, 202 F.3d at 798; *Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985) ("There is no doubt that the Commission's action in this case was an adjudication and not a rulemaking. It is captioned 'Declaratory Ruling,' a category of action which, according to the Commission's rules, is taken 'in accordance with section 5(d) of the Administrative Procedure Act,' 47 C.F.R. § 1.2 (1984). That subsection, now codified at 5 U.S.C. § 554(e) (1982), pertains to adjudication." (internal footnote omitted)).

through adjudication or rulemaking,[47] that discretion is not unlimited. The agency ultimately remains subject to the constraints of the APA, which requires courts to review the agency's action to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[48] The Ninth Circuit, for example, has identified certain situations in which an agency's reliance on adjudication instead of rulemaking constitutes an abuse of discretion.[49] Even though we conclude the Declaratory Ruling was the product of an adjudication, we will consider whether the FCC abused its discretion or otherwise violated the law by promulgating the 90- and 150-day time frames through adjudication rather than rulemaking.[50] On this point,

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[47] *Am. Airlines, Inc.*, 202 F.3d at 797.

[48] 5 U.S.C. § 706(2)(A).

[49] *See MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1151 (9th Cir. 2008) ("An agency adjudication may require a notice and comment period if it constitutes de facto rulemaking that affects the rights of broad classes of unspecified individuals." (internal quotation marks and citations omitted)); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2007) ("Of course, in certain circumstances an agency may abuse its discretion by announcing new rules through adjudication rather than through rulemaking, such as when the rule operates retroactively and disturbs settled expectations.").

[50] *See Am. Airlines, Inc.*, 202 F.3d at 798 (reviewing agency's decision to proceed by adjudication rather than rulemaking for abuse of discretion); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]here may be situations where [an agency's] reliance on adjudication would amount to an abuse of discretion . . . .").

we harbor serious doubts as to the propriety of the FCC's choice of procedures.

Specifically, we note that the Declaratory Ruling's 90- and 150-day time frames bear all the hallmarks of products of rulemaking, not adjudication. Adjudications typically "resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals."[51] In *American Airlines, Inc. v. Department of Transportation*, we held that the Department of Transportation properly used § 554(e)'s declaratory ruling mechanism to resolve a dispute involving the application of the federal law governing airline service at Love Field airport.[52] In that case we specifically observed that "because DOT's order interpreted the rights of a small number of parties properly before it, DOT did not abuse its discretion by acting through an adjudicatory proceeding."[53]

Similarly, in *Mobil Exploration & Producing North America, Inc. v. FERC*,[54] we reviewed an agency's decision to institute a new one-year time limit for successors in interest in gas-producing properties to obtain a new certificate of public con-

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[51] *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994); *see also Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1187-88 (9th Cir. 2010) (per curiam); *San Juan Cable LLC v. P.R. Tel. Co., Inc.*, 612 F.3d 25, 33 n.3 (1st Cir. 2010).

[52] 202 F.3d at 797-98.

[53] *Id.* at 798.

[54] 881 F.2d 193 (5th Cir. 1989).

venience and necessity.[55] The agency instituted the new limit in the course of reviewing a particular successor's application for a certificate.[56] Petitioners challenged the limit on a number of grounds, including that the limit should have been instituted using the formal rulemaking procedure in the APA, and we held that the agency did not abuse its discretion in choosing to establish the limit through adjudication rather than rulemaking.[57] In doing so, we specifically noted that the new time limit was "a relatively minor procedural requirement with limited effect" due to the fact that there were "fewer than 250 large producers that would be subject to the one-year successor filing requirement."[58] Here, the FCC established the 90- and 150-day time frames, not in the course of deciding any specific dispute between a wireless provider and a state or local government, but in a proceeding focused exclusively on providing an interpretation of § 332(c)(7)(B) that would apply prospectively to every state and local government in the United States.

It is true that an agency need not be presented with a specific dispute between two parties in order to use § 554(e)'s declaratory ruling mechanism, because § 554 does not limit an agency's use of declaratory rulings to terminating controversies between parties. Section 554 also empowers agencies to

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[55] *Id.* at 195-96.

[56] *Id.* at 196.

[57] *Id.* at 198-99.

[58] *Id.* at 199.

use declaratory rulings to "remove uncertainty," and there are cases suggesting an agency may use a declaratory ruling to issue interpretations of law that are both general and prospective in their application and divorced from a specific dispute between parties. In *Qwest Services Corp. v. FCC*,[59] the District of Columbia Circuit upheld the FCC's use of a declaratory ruling to announce that certain types of prepaid calling cards were telecommunications services and that their providers were subject to regulation under the TCA.[60] In *Chisholm v. FCC*,[61] the District of Columbia Circuit similarly upheld the FCC's use of a declaratory ruling to determine the application of the Communication Act's equal-time provision to specific types of appearances by political candidates.[62] Nevertheless, even these cases involved concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios. Here, by contrast, the FCC has provided guidance on the meaning of § 332(c)(7)(B)(ii) and (v) that is utterly divorced from any specific application of the statute. The time frames' effect with respect to any particular dispute arising under § 332(c)(7)(B)(ii) will only become clear after adjudication of the dispute in a court of competent jurisdiction. This is classic rulemaking.[63]

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[59] 509 F.3d 531 (D.C. Cir. 2007).

[60] *Id.* at 536-37.

[61] 538 F.2d 349 (D.C. Cir. 1976).

[62] *Id.* at 364-66.

[63] *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442,

Nevertheless, we need not decide whether the FCC abused its discretion by failing to use notice-and-comment rulemaking to establish the time frames. We also do not address the FCC's argument that, even if it did engage in rulemaking, the rulemaking was interpretative rulemaking of the type excepted from the APA's notice-and-comment requirements.[64] We need not decide these questions because any failure by the FCC to comply with the APA in this case was harmless.[65]

"[T]he harmless error rule requires the party asserting error to demonstrate prejudice from the error."[66] An agency's failure to comply with the APA

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448 (9th Cir. 1994) ("Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.").

[64] 5 U.S.C. § 553(d)(2).

[65] *See United States v. Johnson*, 632 F.3d 912, 930 (5th Cir. 2011) ("The APA demands that courts reviewing agency decisions under the Act '[take] due account . . . of the rule of prejudicial error.'" (alteration in original) (quoting 5 U.S.C. § 706)); *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) ("The harmless error rule applies to agency action because '[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.'" (alteration in original) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)).

[66] *Air Can. v. Dep't of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998); *see also Shinseki v. Sanders*, 129 S. Ct. 1696, 1706 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.").

is harmless when the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached."[67] In conducting the harmless error inquiry, we inform our analysis with a number of potentially relevant factors, including (1) "an estimation of the likelihood that the result would have been different"; (2) "an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result"; (3) "a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings"; and (4) "a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference."[68]

The APA's notice-and-comment procedures are familiar:

> Under the APA, agencies issuing rules must publish notice of proposed rulemaking in the *Federal Register* and shall give interested persons an opportunity to participate in the rule making by allowing submission of comments. In addition, the APA requires that publication of a substantive rule shall be made not less than 30 days before its effective date.[69]

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[67] *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (quoting *Braniff Airways v. Civil Aeronautics Bd.*, 379 F.3d 453, 466 (D.C. Cir.1967)) (internal quotation marks omitted).

[68] *Shinseki*, 129 S. Ct. at 1707; *see also Johnson*, 632 F.3d at 930.

[69] *Johnson*, 632 F.3d at 927 (internal quotation marks and

When an agency fails to comply with the APA's notice and comment procedures, the touchstone is "whether it is clear that the lack of notice and comment did not prejudice the petitioner."[70] In this case, there is no indication that any failure of the FCC to comply with the APA's notice-and-comment procedures prejudiced Arlington or the intervenors.

As an initial matter, the FCC published notice of CTIA's petition in the *Federal Register*, and the notice requested comments on CTIA's request that the FCC "clarify the time period in which a state or local zoning authority will be deemed to have failed to act on a wireless facility siting application."[71] The notice also referenced CTIA's requests that the FCC establish specific time frames and implement a system under which an application would be deemed granted if a zoning authority failed to act within the applicable time frame.[72] It is true that the FCC labeled its published notice as a request for comment on a "Petition for Declaratory Ruling" rather than as a "Notice of Proposed Rulemaking," but, as the District of Columbia Circuit has repeatedly held, such a deficiency is not fatal because "'to remand solely because the Commission labeled the action a declara-

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citations omitted); *see also* 5 U.S.C. § 553(b)-(d).

[70] *Johnson*, 632 F.3d at 931.

[71] *See* Wireless Telecommunications Bureau seeks Comment on Petition for Declaratory Ruling by CTIA, 73 Fed. Reg. 50972, 50972 (Aug. 29, 2008).

[72] *Id.* at 50972-73.

tory ruling would be to engage in an empty formality.'"[73]

We also cannot ignore the fact that, after publishing the notice in the *Federal Register*, the FCC received and considered comments from dozens of interested parties, including several of the cities involved in this litigation. Many of those comments raised the very issues now raised before this court, and the FCC addressed those issues in its Declaratory Ruling. Indeed, we are not aware of a single argument the cities now present to this court that was not considered by the FCC in the agency proceedings below. These facts call to mind our recent observations in *United States v. Johnson*:

> The purpose of notice-and-comment rulemaking is to assure fairness and mature consideration of rules having a substantial impact on those regulated. The process allows the agency to educate itself before adopting a final order. In addition, public notice requires the agency to disclose its thinking on matters that will affect regulated parties. These goals, however, may be achieved in cases where the agency's decision-making process centered on the identical substantive claims as those proposed by the party asserting error, even if there were APA deficiencies. It follows that when a party's claims were considered, even if

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[73] *See, e.g., U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 40 (D.C. Cir. 2005) (quoting *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984)).

notice was inadequate, the challenging party may not have been prejudiced.[74]

Finally, to the extent the FCC might have failed to comply with the APA's 30-day waiting period before an adopted rule becomes effective, the cities have suggested no reason why any such waiting period was needed in this case or demonstrated any prejudice resulting from the FCC's failure to delay the effective date of the Declaratory Ruling. We note that "the purpose of the thirty-day waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect."[75] On this point, the Declaratory Ruling itself recognized the need "to give State and local governments an additional period to review currently pending applications before an applicant might file suit."[76] The FCC determined that, for all zoning applications that had been pending for less than 90 days (with respect to collocation applications) or 150 days (with respect to all other applications) at the time of the issuance of the Declaratory Ruling, state or local governments would have an additional 90- or 150-day period before their inaction would be presumed unreasonable under the time frames.[77] For those applications that had been pending for longer than the applicable time frame at the time of the Declaratory

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[74] *Johnson*, 632 F.3d at 931 (internal quotation marks, brackets, and citations omitted).

[75] *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996).

[76] 24 FCC Rcd. 13994 ¶ 51 (2009).

[77] *Id.*

Ruling, the FCC determined state or local governments would have 60 days from the provision of notice by the applicant before the applicant would be able to seek judicial relief.[78] The cities have not demonstrated that the FCC's approach here burdened them in any way. Nor have they pointed to zoning applications they were forced to address earlier due to the FCC's failure to comply with the 30-day waiting period.

We conclude that any error in the FCC's choice to establish the time frames in the Declaratory Ruling instead of through notice-and-comment rulemaking was plainly harmless. The cities received notice of the issues pending before the FCC and had the ability to comment on CTIA's petition in the agency proceedings. More than sixty cities, towns, and villages, and scores of other governmental entities or their representatives submitted comments in response to the FCC's notice. The FCC considered and addressed all of the substantive issues the cities now raise. Any deficiencies in the procedures leading to the Declaratory Ruling do not justify vacating and remanding the order.

IV

The cities also argue the FCC violated due process when it issued the Declaratory Ruling. The cities base this argument on their assertion that the FCC failed to comply with 47 C.F.R. § 1.1206(a) when it considered CTIA's petition. A note to that regulation provides:

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[78] *Id.*

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.[79]

The cities claim CTIA did not serve its petition on the state and local governments whose delays served as the impetus for CTIA's petition. According to the cities, CTIA's failure to serve the petition necessitated its dismissal and the FCC's failure to do so resulted in a denial of due process.

The FCC responds that its decision not to dismiss CTIA's petition was justified by its own interpretation of § 1.1206(a). In the Declaratory Ruling, the FCC concluded: "By its terms, the service requirement does not apply to a petition that cites examples of the practices of unidentified jurisdic-

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[79] 47 C.F.R. § 1.1206(a) note 1.

tions to demonstrate the need for a declaratory ruling interpreting provisions of the Communications Act."[80] The FCC notes that CTIA's petition did not identify specific municipalities and that nothing in its rules required the petition to do so.

Reduced to its essence, the cities' claim is that the FCC violated due process by failing to ensure that CTIA's petition was served on the specific state and local governments whose delays caused CTIA to petition the FCC for the Declaratory Ruling. We do not believe that due process required such individual service in this case because the FCC, in issuing the Declaratory Ruling, was not adjudicating the legality of the actions of those state and local governments. The FCC was not confronted with a concrete dispute the resolution of which would have an immediate effect on specific individuals.[81] As noted above, in this sense the Declaratory Ruling was more akin to a rulemaking than the typical adjudication, and we have observed that "[w]hen a rule is established through statutory rulemaking, public notice and hearing provide the necessary protection. . . . Such notice is provided by publication of the proposed rulemaking in the Federal Register, and all parties who will be affected by the rule are given an opportunity to challenge [the agency's] action."[82] Here, the

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[80] 24 FCC Rcd. 13994 ¶ 68 (2009).

[81] *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) ("[B]ecause adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute).").

[82] *Mobil Exploration & Producing N. Am., Inc. v. FERC*, 881

FCC provided notice of CTIA's petition in the *Federal Register* and allowed all interested parties to provide comments on CTIA's petition. Under the circumstances of this case, those procedures were adequate to satisfy due process.

V

Regarding the determinations in the FCC's Declaratory Ruling, we begin with the cities' suggestion that the FCC lacked the statutory authority to adopt the 90- and 150-day time frames. As noted above, those time frames represent the FCC's construction of language in § 332(c)(7)(B)(ii) and (v). The cities argue, however, that § 332(c)(7)(A) precludes the FCC from exercising authority to implement that language. The cities also note that § 332(c)(7)(B)(v) places jurisdiction over disputes arising under § 332(c)(7)(B)(ii) in the courts and suggests that this jurisdictional provision supports its proposed reading of § 332(c)(7)(A).

The FCC, on the other hand, contends that it possessed statutory authority to adopt the 90- and 150-day time frames pursuant to its general authority to make such rules and regulations as may be necessary to carry out the Communication Act's provisions.[83] The FCC argues that § 332(c)(7)(A) does not bar the FCC from exercising this authority because the FCC interprets § 332(c)(7)(A) as merely precluding the FCC from imposing additional limita-

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F.2d 193, 199 (5th Cir. 1989); *see also Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989).

[83] *See, e.g.*, 47 U.S.C. §§ 151, 154(i), 201(b), 303(r).

tions on state and local government authority over the wireless facility zoning process beyond those already provided for in § 332(c)(7)(B). Under the FCC's interpretation, the FCC retains the authority to implement the limitations already set forth in § 332(c)(7)(B).

A

We ordinarily review an agency's interpretation of the statutes it is charged with administering using the *Chevron* two-step standard of review.[84] Under *Chevron*, we first ask "whether Congress has directly addressed the precise question at issue."[85] If Congress has addressed the question, "we must give effect to the unambiguously expressed intent of Congress."[86] If we determine that the statute is silent or ambiguous with respect to the precise question at issue, however, we then "consider whether the agency's answer is based on a permissible construction of the statute."[87] "As long as the agency's construction of an ambiguous statute is permissible, it

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[84] *See Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 796 (5th Cir. 2000).

[85] *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)) (internal quotation marks omitted).

[86] *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 393 (5th Cir. 2008) (quoting *Chevron*, 476 U.S. at 843) (internal quotation marks omitted).

[87] *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749 (5th Cir. 2011) (quoting *Chevron*, 476 U.S. at 483) (internal quotation marks omitted).

must be upheld."[88] Although we engage in the *Chevron* analysis when reviewing an agency's interpretation of a statute it is charged with administering, we do not use *Chevron* when reviewing an agency's interpretation of a statute it is not charged with administering.[89]

The issue in the instant case is whether the FCC possessed statutory authority to administer § 332(c)(7)(B)(ii) and (v) by adopting the 90- and 150-day time frames. Although it is clear that *Chevron* review does not apply once it is determined that an agency lacks authority to interpret a statute, the parties dispute whether *Chevron* review should apply when we determine the extent of the agency's jurisdiction. The FCC argues that an agency's interpretation of its own statutory authority is subject to review under *Chevron*. The cities, on the other hand, argue the issue presents "a pre-*Chevron* question of law regarding the scope of the FCC's authority" and that such a question of law is subject to de novo review.

The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction,[90] and the circuit courts of ap-

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[88] *Am. Airlines, Inc.*, 202 F.3d at 796.

[89] *Id.*

[90] *See Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) (collecting cases and observing that the Supreme Court has yet to resolve the debate over whether *Chevron* applies to disputes about the scope of an agency's jurisdiction).

peals have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an agency's jurisdiction,[91] some do not,[92] and some circuits have thus far avoided taking a position.[93] In this circuit, we apply *Chevron* to an agency's interpretation of its own statutory jurisdiction, and therefore, we will apply the *Chevron* framework when determining whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames.[94]

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[91] *See, e.g., Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-46 (10th Cir. 2010) (en banc) ("Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, . . . including statutory ambiguities affecting the agency's jurisdiction . . . ." (internal citations omitted)); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) ("When Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one. . . . This rule of deference is fully applicable to an agency's interpretation of its own jurisdiction." (internal citation omitted)).

[92] *See, e.g., N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002) (concluding that de novo review is appropriate for questions involving an agency's determination of its own jurisdiction); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998) (reviewing agency's legal conclusion regarding the scope of its own jurisdiction without deference to the agency's determination).

[93] *See Pruidze*, 632 F.3d at 237 (leaving the question unanswered); *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (same).

[94] *Texas v. United States*, 497 F.3d 491, 501 (5th Cir. 2007) (observing that *Chevron* step one applies to "challenges to an

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"At the first step of a *Chevron* analysis, we must determine whether Congress has directly spoken in a manner that reveals its expressed intent."[95] "We use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue,"[96] and "[t]here is no better or more authoritative expression of congressional intent than the statutory text."[97] We determine the plainness or ambiguity of the statutory text by referencing "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[98] "'[W]here the statutory language is unambiguous and the statutory scheme is coherent and consistent,' the language of the stat-

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agency's interpretation of a statute, as well as whether the statute confers agency jurisdiction over an issue"); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-46 (5th Cir. 1999) (applying *Chevron* to a question concerning the scope of the FCC's statutory authority to provide universal service support for schools, libraries, and rural health-care providers); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (per curiam) ("[T]his circuit has accorded deference to an agency's determination of its own statutory authority.").

[95] *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 394 (5th Cir. 2008) (quoting *Chevron*, 476 U.S. at 843) (internal quotation marks omitted).

[96] *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749 (5th Cir. 2011) (citing *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Bd.*, 201 F.3d 551, 554 (5th Cir. 2000)).

[97] *Med. Ctr. Pharm.*, 536 F.3d at 394.

[98] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

ute is usually where we end."[99] If the statutory language is susceptible to more than one reasonable interpretation, however, it is ambiguous and we must proceed to *Chevron* step two.[100]

As noted above, the FCC argues that its general authority to make rules and regulations to carry out the Communications Act includes the power to implement § 332(c)(7)(B)(ii) and (v). One express grant is found at 47 U.S.C. § 201(b), which provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." The Supreme Court has held the FCC's rulemaking authority under § 201(b) extends to provisions added by the TCA because Congress passed the TCA as an amendment to the Communications Act.[101] Congress

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[99] *Med. Ctr. Pharm.*, 536 F.3d at 394 (quoting *Robinson*, 519 U.S. at 340).

[100] *See United States v. Hoang*, 636 F.3d 677, 682 (5th Cir. 2011) ("It is familiar learning that '[a] statute is ambiguous if it is susceptible to more than one reasonable interpretation or more than one accepted meaning.'" (quoting *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010)); *Comacho v. Tex. Workforce Comm'n*, 408 F.3d 229, 234 (5th Cir. 2005) ("Generally, a statute is ambiguous if it is 'capable of being understood in two or more possible senses or ways.'" (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001)).

[101] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."); *see also AT&T Commc'ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 641 (5th Cir. 2001).

retains the ability to restrict its grant of power to an agency, though, and the cities argue Congress included language in the TCA precluding the FCC from using the Communication Act's grant of general authority to implement § 332(c)(7)(B)'s limitations.[102] The cities point to § 332(c)(7)(A), which provides: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." The cities also claim that § 332(c)(7)(B)(v)'s vesting of jurisdiction in the courts to review disputes arising under § 332(c)(7)(B)(ii) evinces Congress's intent to remove jurisdiction over § 332(c)(7)(B)(ii) from the FCC.

The question we confront under *Chevron* is whether these provisions unambiguously indicate Congress's intent to preclude the FCC from implementing § 332(c)(7)(B)(ii) and (v). If they do, the FCC lacked statutory authority to issue the 90- and 150-day time frames. If the provisions are ambiguous, however, we must defer to the FCC's interpretation—an interpretation under which the FCC possessed authority to issue the 90- and 150-day time frames—so long as the FCC's interpretation represents a reasonable construction of their terms. For

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[102] *Cf. First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (per curiam) ("As part of its legislative powers, Congress designates the scope of agency authority, and if Congress so chooses, it can subsequently restrict or limit that delegation of power to the agency.").

the following reasons, we conclude neither § 332(c)(7)(A) nor § 332(c)(7)(B)(v) unambiguously preclude the FCC from establishing the 90- and 150-day time frames.

First, we note that § 332(c)(7)(A), when it states "[e]xcept as provided in this paragraph," removes § 332(c)(7)(B)'s limitations from its reach and recognizes those limitations as legitimate intrusions into state and local governments' traditional authority over zoning decisions. The fundamental question then, is whether § 332(c)(7)(A), in restricting the TCA's limitations on state or local zoning authority to only those contained in § 332(c)(7)(B), also precludes the FCC from implementing those limitations by relying on its general rulemaking authority under the Communications Act. This is a question to which § 332(c)(7)(A) itself does not provide a clear answer. Section 332(c)(7)(A) states Congress's desire to make § 332(c)(7)(B)'s limitations the only limitations confronting state and local governments in the exercise of their zoning authority over the placement of wireless services facilities, and thus certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of § 332(c)(7)(B). Whether the FCC retains the power of implementing those limitations, however, remains unresolved.

Congress's silence on this point is not without implication. Had Congress intended to insulate § 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly because Congress surely recognized that it was legislating against the background of the Communica-

tions Act's general grant of rulemaking authority to the FCC. The FCC's general grant of authority would ordinarily extend to amendments to the Communications Act, like § 332(c)(7)(B)'s limitations, in the absence of specific statutory limitations on that authority,[103] and Congress certainly knew how to specifically restrict the FCC's general authority over the Communications Act as it clearly restricted the FCC's ability to use that authority in other contexts.[104] Here, however, Congress did not clearly remove the FCC's ability to implement the limitations set forth in § 332(c)(7)(B), and this Congressional silence leaves § 332(c)(7)(A)'s effect on the FCC's authority to administer § 332(c)(7)(B)'s limitations ambiguous.

Moreover, the cities' reliance on § 332(c)(7)(B)(v) does not resolve § 332(c)(7)(A)'s ambiguity. The cities contend that, by establishing jurisdiction in the courts over specific disputes arising under § 332(c)(7)(B)(ii), Congress indicated its intent to remove that provision from the scope of the FCC's general authority to administer the Communications Act. The cities read too much into § 332(c)(7)(B)(v)'s terms, however. Although § 332(c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under § 332(c)(7)(B)(ii), the provision

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[103] *See AT&T Corp.*, 525 U.S. at 378.

[104] *See, e.g.*, 47 U.S.C. § 152(b) (listing specific exceptions to the FCC's authority over the Communications Act); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369-76 (1986) (holding § 152(b) "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes").

does not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act. Accordingly, one could read § 332(c)(7) as a whole as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision.

The Sixth Circuit recently addressed a similar statutory scheme in *Alliance for Community Media v. FCC*.[105] That decision involved provisions of the Communications Act that delegated to municipalities, in the form of local franchising authorities (LFAs), the power to award cable franchises.[106] The provisions at issue further provided that an LFA could not "unreasonably refuse to award an additional competitive franchise,"[107] and "endowed potential entrants with a judicial remedy by entitling them to commence an action in a federal or state court within 120 days after receiving a final, adverse decision from an LFA."[108] After the FCC promulgated rules delineating situations that would consti-

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[105] 529 F.3d 763 (6th Cir. 2008).

[106] *Id.* at 768.

[107] *Id.*

[108] *Id.*

tute an unreasonable refusal to award a cable franchise, petitioners claimed (among other arguments) that the statute's identification of courts as the forum for aggrieved cable operators to obtain relief deprived the FCC of statutory authority to exercise its rulemaking power. The court rejected that argument, holding that "the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1)."[109] The decision in *Alliance for Community Media* supports the conclusion that there is nothing inherently unreasonable about reading § 332(c)(7) as preserving the FCC's ability to implement § 332(c)(7)(B)(ii) while providing for judicial review of disputes under § 332(c)(7)(B)(ii) in the courts.[110] Section 332(c)(7)(B)(v)'s vesting in the courts of jurisdiction over disputes arising under § 332(c)(7)(B)(ii) thus does not unambiguously preclude the FCC from taking the action at issue in this case.

In sum, we conclude that § 332(c)(7) is ambiguous with respect to the FCC's authority to estab-

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[109] *Id.* at 775.

[110] *Id.* at 776 ("[W]e believe that courts can grant deference to the Order while maintaining their Congressionally-granted authority to make factual determinations and provide relief to aggrieved cable operators."). *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) ("While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to rural LECs, these assignments . . . do not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments." (internal citations omitted)).

lish the 90- and 150-day time frames. Although the statute clearly bars the FCC from using its general rulemaking powers under the Communications Act to create additional limitations on state and local governments beyond those the statute provides in § 332(c)(7)(B), the statute is silent on the question of whether the FCC can use its general authority under the Communications Act to implement § 332(c)(7)(B)'s limitations. We proceed to *Chevron* step two.

C

Once we determine that a statute is silent or ambiguous with respect to a question at issue, we must defer to the agency's resolution of the question if the agency's interpretation is based on a permissible construction of the statute.[111] In addition to arguing that the plain text of § 332(c)(7) precludes the FCC from establishing the 90- and 150-day time frames, the cities make a number of other arguments that seemingly attack the permissibility of any construction of the statute that would allow the FCC to exercise the power that it did in this case. First, the cities claim § 332(c)(7)'s legislative history supports their proposed reading of § 332(c)(7) and not the FCC's. Second, they suggest that a construction of § 332(c)(7) that would grant the FCC authority to implement § 332(c)(7)(B)'s limitations on state and local government would conflict with the principle that

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[111] *See, e.g.*, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

"if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute."[112] Finally, they suggest the FCC itself had long recognized that it lacked jurisdiction with respect to § 332(c)(7)(B)'s limitations. These arguments are not persuasive.

Regarding the legislative history surrounding the passage of § 332(c)(7), the cities note Congress considered but ultimately did not enact a version of the statute that directed the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services."[113] The cities also point to the Conference Report from the passage of the TCA, which provides in pertinent part:

> The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is

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[112] *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)) (internal quotation marks and citations omitted).

[113] H.R. REP. NO. 104-204, pt. 1, at 25 (1995).

> the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.[114]

The cities argue the FCC's construction of § 332(c)(7) contravenes this legislative history. The implication, then, is that this legislative history clarifies any ambiguity in § 332(c)(7)'s plain text and indicates Congress's intent to remove from the FCC the authority to implement § 332(c)(7)(B)(ii) and (v).

This argument fails, however, because the legislative history itself is ambiguous. Although the legislative history surrounding the passage of § 332(c)(7) indicates Congress intended the provision to remove from the FCC the authority to make new rules limiting or affecting state and local government authority over wireless zoning decisions, the legislative history, like the statute itself, is silent as to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) expressly imposes on state and local governments. In other words, the legislative history does no more than indicate Congress's intent

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[114] H.R. REP. NO. 104-458, at 207-08 (1996) (Conf. Rep.).

to bar the FCC from imposing additional limitations on state and local government authority. It does not indicate a clear intent to bar FCC implementation of the limitations already expressly provided for in the statute. Under these circumstances, we cannot conclude that the legislative history "is so clear and compelling . . . that it leaves no doubt as to Congress's intent."[115]

The cities also suggest that interpreting § 332(c)(7) in a way that would allow the FCC to implement § 332(c)(7)(B)(ii) and (v) conflicts with the principle that "if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute."[116] The cities assert that the FCC's new 90- and 150-day time frames displace state laws establishing different time frames.

The cities' argument is unconvincing because those state laws are already preempted, at least to the extent that the state time limits violate § 332(c)(7)(B)(ii)'s requirement that state and local authorities rule on zoning requests in a reasonable amount of time. That section already acts to preempt these state laws by creating a federal time frame defined through reference to reasonableness. No one

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[115] *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 396 (5th Cir. 2008).

[116] *City of Dallas, Tex.*, 165 F.3d at 347-48 (quoting *Gregory*, 501 U.S. at 460) (internal quotation marks and citations omitted).

could plausibly argue, for example, that if a state passed a law stating that local governments had ten years to rule on such applications, § 332(c)(7)(B)(ii) would not have the effect of preempting that law insofar as an aggrieved party would likely be able to petition a court for relief under § 332(c)(7)(B)(v) well before the expiration of the state's time frame. FCC action interpreting what amount of time is "reasonable" under § 332(c)(7)(B)(ii) only further refines the extent of the preemption that Congress has already explicitly provided. We thus see no conflict between the FCC's ability to interpret § 332(c)(7)(B)'s limitations on state and local government authority and the principle that Congress must unmistakably indicate its intent to preempt a power traditionally exercised by state or local governments because Congress has indicated a preference for federal preemption of state and local laws governing the time frames for wireless zoning decisions.[117]

Finally, the cities argue that "[u]ntil its dramatic shift in the [Declaratory Ruling], the FCC had long recognized the statutory limits on its jurisdiction under Section 332(c)(7)." The cities claim the FCC's exercise of authority to interpret § 332(c)(7)(B)(ii) and (v) conflicts with the FCC's own longstanding interpretation of its jurisdiction. The cities note that the Supreme Court, in *New Process*

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[117] *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999) ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.").

Steel, L.P. v. NLRB,[118] made the following observation when interpreting the statute establishing the NLRB's quorum requirements: "That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view."[119]

We are not persuaded by this argument in this case, however, because the FCC interpretations to which the cities direct us do not adopt the position that the FCC lacks authority to implement § 332(c)(7)(B)'s limitations. For example, in *In re Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, the FCC did observe that "Section 332(c)(7) generally preserves local authority over land use decisions, and limits the Commission's authority in this area,"[120] but a review of that order makes clear that the limitation to which the FCC was referring was § 332(c)(7)(B)(v)'s grant of exclusive jurisdiction to the courts over most disputes arising under § 332(c)(7)(B).[121] The FCC's order in *In re Cingular Wireless L.L.C.*[122] and a letter from the chief of the FCC's Wireless Telecommunications Bu-

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[118] 130 S. Ct. 2635 (2010).

[119] *Id.* at 2641-42.

[120] 19 FCC Rcd. 24084 ¶ 123 (2004).

[121] *Id.* at n.368.

[122] 18 FCC Rcd. 13126 ¶ 21 (2003).

reau[123] similarly contained observations on the limits of the FCC's authority to consider petitions challenging specific state or local government action. As already discussed, that § 332(c)(7)(B)(v) vests exclusive jurisdiction in the courts to consider specific disputes arising under § 332(c)(7)(B) does not limit the FCC's ability to implement § 332(c)(7)(B)'s limitations. Thus, the FCC's acknowledgment of this limitation hardly suggests that the FCC also recognized a limit on its authority under § 201(b).

D

For the above reasons, we conclude the FCC is entitled to deference with respect to its exercise of authority to implement § 332(c)(7)(B)(ii) and (v). The language of § 332(c)(7) is silent with respect to the FCC's power to exercise this authority, and none of the cities' arguments convince us that the FCC's interpretation of its statutory authority is impermissible. The FCC thus did not lack statutory authority to establish the 90- and 150-day time frames.

VI

We now consider whether the 90- and 150-day time frames themselves also pass muster under *Chevron*. The time frames represent the FCC's attempt to implement § 332(c)(7)(B)(ii) and (v). Section 332(c)(7)(B)(ii) requires state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities

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[123] Letter from Michele C. Farquhar to Mr. Thomas E. Wheeler (Jan. 13, 1997), 1997 WL 14744.

within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." Section 332(c)(7)(B)(v) provides that any person adversely affected by a state or local government's "failure to act" may "within 30 days after such . . . failure to act, commence an action in any court of competent jurisdiction." In the Declaratory Ruling, the FCC defined "a reasonable period of time" for purposes of § 332(c)(7)(B)(ii) as, presumptively, "90 days to process personal wireless service facility siting applications requesting collocations, and . . . 150 days to process all other applications."[124] The FCC also concluded that a lack of decision within these time frames would constitute a failure to act that would be actionable under § 332(c)(7)(B)(v).[125]

A

As usual, we begin with the statutory text. The FCC claims that § 332(c)(7)(B)(ii) and § 332(c)(7)(B)(v) are ambiguous and subject to FCC interpretation. We agree. Specifically, we note that the phrase "a reasonable period of time," as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous.[126] More-

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[124] 24 FCC Rcd. 13994 ¶ 32 (2009).

[125] *Id.*

[126] *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 777 (6th Cir. 2008) (observing that descriptors such as "reasonable" and "unreasonable" are subject to multiple constructions); *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("[T]he generality of these terms—unjust, unreasonable—opens a rather large area for the free play of agency discretion." (internal quotation

over, because the phrase "a reasonable period of time" serves as a standard for determining when a "failure to act" has occurred under § 332(c)(7)(B)(v), the ambiguity in the phrase leaves room for agency guidance on the amount of time state and local governments have to act on wireless facility zoning applications before their delay constitutes a failure to act under the statute that would trigger § 332(c)(7)(B)(v)'s 30-day limitations period on filing an action in court. We thus owe substantial deference to the FCC's interpretation of these terms, and we will disturb the FCC's interpretation only if it represents an impermissible construction of § 332(c)(7)(B)(ii) and (v).[127]

B

The cities raise a number of arguments relevant to the reasonableness of the FCC's establishment of the 90- and 150-day time frames. They claim the FCC's time frames represent unreasonable in-

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marks omitted)); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[127] *See, e.g., Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010); *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 457-58 (D.C. Cir. 2000) ("If we find the statute silent or ambiguous with respect to the precise question at issue, we proceed to the second step of *Chevron* analysis, asking whether the agency's answer is based on a permissible construction of the statute. At this stage of *Chevron* analysis, we afford substantial deference to the agency's interpretation of statutory language." (internal quotation marks and citations omitted)).

terpretations of the statute because they: (1) shift the burden to state and local governments to demonstrate in court that a delay in acting on a wireless facility zoning application was reasonable, thus reversing the presumption against preemption; (2) seek to force state or local government action by creating a heightened threat of litigation; (3) impose new application completeness requirements; (4) create a national standard for what constitutes a "reasonable period of time"; and (5) contravene Congressional intent by giving preferential treatment to the wireless industry in the processing of zoning applications. After considering these arguments, however, we conclude that the FCC's 90- and 150-day time frames are based on a permissible construction of § 332(c)(7)(B)(ii) and (v) and are thus entitled to *Chevron* deference.

1

First, the cities observe that courts addressing actions brought pursuant to § 332(c)(7)(B)(v) have placed the burden on the plaintiff to prove that a state or local government has failed to comply with one of § 332(c)(7)(B)'s requirements.[128] They claim the FCC's time frames reverse this burden by creating a presumption that a state or local government that fails to act on a zoning application within the applicable 90- or 150-day time frame has "failed to

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[128] *See, e.g., U.S. Cellular Corp. v. City of Wichita Falls, Tex.*, 364 F.3d 250, 256 (5th Cir. 2004) ("The plaintiff carries the burden of proving that no substantial evidence supports the local government's decision [in an action challenging the decision under § 332(c)(7)(B)(iii)].").

act" under § 332(c)(7)(B)(v). The result, they argue, is that "the 'presumption against preemption' is replaced with a presumption *for* preemption" because the burden of proof rests on state and local governments to prove the reasonableness of their delay in cases in which they have failed to act within the time frames.

We disagree with this characterization of the effect of the FCC's presumption because it misstates the typical effect of a presumption in a civil proceeding. Federal Rule of Evidence 301, for example, describes the effect of presumptions in civil proceedings in federal court. It provides:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.[129]

We have held that Rule 301 adopts a "bursting-bubble" theory of presumption, under which "the *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact."[130] "If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears from the case."[131] In other words, once a party introduces

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[129] FED. R. EVID. 301.

[130] *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1136 (5th Cir. 1986).

[131] *Id.* at 1136-37.

rebuttal evidence sufficient to support a finding contrary to the presumed fact, the presumption evaporates, and the evidence rebutting the presumption, and its inferences, must be "judged against the competing evidence and its inferences to determine the ultimate question at issue."[132] The burden of persuasion with respect to the ultimate question at issue remains with the party on whom it originally rested.[133]

We see no reason why this general theory of presumptions does not also apply to the presumption created by the FCC's Declaratory Ruling. In an action seeking to enforce § 332(c)(7)(B)(ii) against a state or local government, the ultimate burden of persuasion remains with the wireless facilities provider to demonstrate that the government unreasonably delayed action on an application. True, the

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[132] *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 288 (3d Cir. 2006) (internal quotation marks omitted).

[133] *See* FED. R. EVID. 301 (noting "the burden of persuasion . . . remains on the party who had it originally"); *cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) ("It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. In this regard it operates like all presumptions, as described in Federal Rule of Evidence 301." (internal quotation marks, brackets, and citations omitted)).

wireless provider would likely be entitled to relief if it showed a state or local government's failure to comply with the time frames and the state or local government failed to introduce evidence demonstrating that its delay was reasonable despite its failure to comply. But, if the state or local government introduced evidence demonstrating that its delay was reasonable, a court would need to weigh that evidence against the length of the government's delay—as well as any other evidence of unreasonable delay that the wireless provider might submit—and determine whether the state or local government's actions were unreasonable under the circumstances.

2

The cities also argue that the 90- and 150-day time frames represent unreasonable interpretations of the statute because the time frames subject state and local governments to a heightened risk of litigation by wireless service providers. The cities suggest that this heightened risk "affects" state or local governments and thus violates § 332(c)(7)(A). This argument is not convincing, however, because, although the FCC's time frames do provide some amount of certitude as to when a state or local government has unreasonably failed to act under § 332(c)(7)(B)(ii), the time frames do not create any new risk of litigation independent from the risk state or local governments have always faced as a result of § 332(c)(7)(B)(v)'s vesting of jurisdiction in the courts to hear disputes arising under § 332(c)(7)(B)(ii). As we have already discussed, § 332(c)(7)(A) does not

apply to § 332(c)(7)(B)'s restrictions on state and local governments.

3

The cities also take issue with the FCC's determination that the 90- and 150-day time frames do not start to run with respect to an application if the application is incomplete and the state or local government alerts the applicant to the application's incompleteness within 30 days of its submission. The effect of this determination, they argue, is the imposition of a new "completeness requirement" that has no basis in § 332(c)(7)(B)(ii).

We disagree. The FCC's decision to toll the time frames when a state or local government confronts an incomplete application accounts for the fact that the completeness of an application affects the ability of a decisionmaker to act on that application. The FCC recognized that in such cases, a state or local government could not be presumed to have acted unreasonably simply because the government failed to act on an application within the time frames. The FCC also recognized, however, that a state or local government that confronted an incomplete application, but delayed alerting the applicant to the deficiencies in the application, should be presumed to have acted unreasonably if the government ultimately did not act on the application within the time frames. Thus, the FCC allowed for tolling of the 90- and 150-day time frames in cases of incompleteness, but also imposed a separate time frame for state and local governments to notify applicants of incompleteness in order to prevent state and local govern-

ments from manipulating the process. This does not strike us as an unreasonable application of § 332(c)(7)(B)(ii).[134]

To the extent the cities argue that state and local governments often will not become aware of a need for more information with respect to an application until after the FCC's 30-day tolling period has expired, we again emphasize the limited effect of the FCC's 90- and 150-day time frames. The time frames represent the FCC's interpretation of what would generally constitute an unreasonable delay under § 332(c)(7)(B)(ii), but a court will ultimately decide whether state or local government action is unreasonable in a particular case. Accordingly, if a state or local government fails to meet the applicable time frame because deficiencies in an application become apparent more than 30 days after the application was filed, the government would remain free to argue that it acted reasonably under the circumstances.

4

Fourth, the cities contend the 90- and 150-day time frames are not reasonable interpretations of § 332(c)(7)(B)(ii) because the time frames apply nationwide and thus cannot be squared with §

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[134] *Cf. Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 780 (6th Cir. 2008) ("Courts are 'generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" (alteration in original) (quoting *Covad Comm. Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006))).

332(c)(7)(B)(ii)'s command that what constitutes a "reasonable period of time" should be determined by taking into account "the nature and scope of such request." This is an individualized determination, the argument goes, and a national standard is incompatible with such a scheme. We cannot agree with the cities on this point, however, because, as we have already made clear, the 90- and 150-day time frames do not eliminate the individualized nature of an inquiry into the reasonableness of a state or local government's delay. The time frames do provide the FCC's guidance on what periods of time will generally be "reasonable" under the statute, of course, and they might prove dispositive in the rare case in which a state or local government submits no evidence supporting the reasonableness of its actions. But in a contested case, courts must still determine whether the state or local government acted reasonably under the circumstances surrounding the application at issue.

5

Finally, the cities claim the FCC's time frames are unreasonable interpretations of § 332(c)(7)(B) because they will require state and local governments to give wireless service providers preferential treatment in the form of prioritized review of wireless zoning applications. They claim this result clearly conflicts with Congress's intent, and for support, point to the following passage from the Conference Report: "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to

subject their requests to any but the generally applicable time frames for zoning decision[s]."[135] However, nothing in the FCC's time frames necessarily requires state and local governments to provide greater preference to wireless zoning applications than is already required by § 332(c)(7)(B)(ii) itself. The statute provides a clear directive that state and local governments must rule on wireless zoning applications in a "reasonable amount of time," and that directive inherently preferences the personal wireless service industry because other types of state and local zoning decisions are not subject to such a standard.[136] Moreover, as already noted, a state or local government that fails to act on an application within the FCC's time frames remains free to argue that it acted diligently with respect to the application, and such an argument might include reference to the inability of the government to address the wireless zoning application within the time frames without neglecting its other business.[137]

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[135] H.R. REP. NO. 104-458, at 208 (1996) (Conf. Rep.).

[136] *Cf. Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 396 (5th Cir. 2008) (observing that appeals to statutory purpose only overcome an agency's interpretation of a statute's text when "the statute's purpose is so clear and compelling, despite tension with its plain text, that it leaves no doubt as to Congress's intent").

[137] *Cf. SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190, 198-99 (D.R.I. 2000) (concluding that a zoning board was not dilatory in its treatment of an application because the board considered applications in the order in which they were filed, hearings on the application were postponed due to the protracted nature of hearings on a different application, and the zoning board tried

In short, we believe the cities' challenges to the reasonableness of the 90- and 150-day time frames stem from a misunderstanding of the time frames' effect on the wireless zoning application process. We do not read the Declaratory Ruling as creating a scheme in which a state or local government's failure to meet the FCC's time frames constitutes a *per se* violation of § 332(c)(7)(B)(ii). The time frames are not hard and fast rules but instead exist to guide courts in their consideration of cases challenging state or local government inaction. It is true that courts considering such cases will owe deference to the FCC's determination that a state or local government's failure to comply with the time frames constitutes unreasonable delay. In the rare case in which a state or local government fails to submit any evidence demonstrating the reasonableness of its inaction, the government's failure to comply with the FCC's time frames will likely be dispositive of the question of the government's compliance with § 332(c)(7)(B)(ii). The more likely scenario, however, is that a state or local government that has failed to act within the time frames will attempt to rebut the presumption of unreasonableness by pointing to reasons why the delay was reasonable. It might do so by pointing to extenuating circumstances, or to the applicant's own failure to submit requested information. Or it might note that it was acting diligently in

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to expedite matters by supplementing its monthly meetings with several special meetings regarding the application).

its consideration of an application,[138] that the necessity of complying with applicable state or local environmental regulations occasioned the delay,[139] or that the application was particularly complex in its nature or scope.[140] All of these factors might justify the conclusion that a state or local government has acted reasonably notwithstanding its failure to comply with the FCC's time frames. We do not list these possibilities to establish a definitive list of the circumstances that might cause a state or local government to have acted reasonably, however, as adjudications of specific disputes under the statute will ultimately determine how specific circumstances relate to the FCC's time frames. Our point here is simply to note both that a variety of circumstances can affect the consideration and determination of a wireless facility zoning application, and that these circumstances remain relevant even after the FCC issued its time frames.

VII

The cities also claim the FCC's establishment of the 90- and 150-day time frames was "arbitrary,

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[138] *See id.*

[139] *See N.Y. SMSA Ltd. P'ship v. Town of Riverhead*, 45 F. App'x 24, 26-27 (2d Cir. 2002) (unpublished).

[140] *See Omnipoint Commc'ns Enters., Inc. v. Town of Amherst, N.H.*, 74 F. Supp. 2d 109, 122 (D.N.H. 1998) ("The [Zoning Board of Adjustment] chairman noted that the ZBA had received more information relating to the plaintiff's applications than any previous applications. In addition, the volume of public response to the applications was extremely high.").

capricious, an abuse of discretion, or otherwise not in accordance with law."[141] Agency action is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[142]

Our scope of review under the arbitrary and capricious standard is narrow, and we cannot substitute our own judgment for that of the agency.[143] "We limit our review to whether the agency articulated a rational connection between the facts found and the decision made, and it is well-settled that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[144] "Our mandate is not to 'weigh the evidence pro and con but to determine whether the agency decision was based on a consid-

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[141] *See* 5 U.S.C. § 706; *Defensor v. Meissner*, 201 F.3d 384, 386 (5th Cir. 2000) ("Under the Administrative Procedure Act, agency action is reviewed solely to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[142] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[143] *Id.*

[144] *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 380 (5th Cir. 2008) (internal quotation marks and citations omitted).

eration of relevant factors and whether there was a clear error of judgment.'"[145] "[I]f the agency considers the factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary or capricious."[146]

We cannot conclude that there has been a clear error of judgment in this case. The record reflects the FCC issued the Declaratory Ruling only after receiving dozens of comments from wireless service providers, local zoning authorities, and other interested parties, and many of those comments supported the FCC's conclusion that wireless service providers often face lengthy delays in the consideration of collocation and new wireless facility zoning applications. CTIA's petition, for example, claimed that a survey of its members indicated that of the 3,300 wireless siting applications currently pending before local governments, 760 had been pending for more than one year and 180 had been pending for over three years. Comments from wireless services providers supported CTIA's claims. T-Mobile USA, Inc., for example, submitted comments indicating that over thirty percent of T-Mobile's currently pending proposals involving new wireless facilities had been pending for more than one year and that nearly one-third of its currently pending collocation applications had been pending for more than one year. Verizon Wireless submitted comments claiming that, of

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[145] *Id.* (quoting *Delta Found., Inc. v. United States*, 303 F.3d 551, 563 (5th Cir. 2002)).

[146] *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994).

the over 350 non-collocation zoning requests it currently had pending, over half had been pending for more than six months and nearly 100 had been pending for more than one year. Alltel Communications, LLC, submitted comments indicating a number of Alltel's collocation and new facility applications had been pending with local zoning authorities for over one year.

The cities argue that this evidence exaggerates the proportion of applications that face significant delay with local zoning boards because, by comparing the number of applications facing significant delays to the number of applications currently pending with local zoning authorities, the evidence fails to account for the applications that local zoning authorities have already approved. The cities also seize on comments by wireless service providers indicating that the vast majority of local governments act on wireless zoning applications in a timely manner. Taken together, the cities argue that this evidence demonstrates that there was no real need for agency action in this case.

We believe the cities' argument is an invitation for this court to independently weigh the evidence before the agency, an undertaking that would exceed the scope of our judicial review. Whether the FCC's decision in this case was ideal, or even necessary, is irrelevant to the question of whether it was arbitrary and capricious "so long as the agency gave at least minimal consideration to the relevant facts as contained in the record."[147] Here, the administra-

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[147] *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th

tive record demonstrates that wireless service providers in many areas of the country face significant delays with respect to their facilities zoning applications, and we believe the FCC properly considered this information and determined that both wireless service providers and zoning authorities would benefit from FCC guidance on what lengths of delay would generally be unreasonable under § 332(c)(7)(B)(ii). This conclusion was not arbitrary and capricious.

VIII

Finally, one of the intervenors in Arlington's petition for review, the EMR Policy Institute (EMR), presents the claim that the FCC acted arbitrarily and capriciously when it dismissed a cross-petition that EMR filed during the agency proceedings. In its petition, EMR claimed FCC regulations concerning the radio frequency emissions of personal wireless facilities were inadequate and requested that the FCC interpret § 332(c)(7)(B)(iv) to allow state and local governments to restrict the siting of personal wireless facilities on the basis of environmental factors that EMR claimed the FCC failed to address in its regulations.[148] We decline to consider EMR's argument for the same reason we refuse to consider the additional arguments raised by San Antonio—as

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Cir. 2010).

[148] Section 332(c)(7)(B)(iv) preempts state or local regulation of the placement of personal wireless facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

an intervenor, EMR cannot present issues that are not raised in Arlington's petition for review.[149]

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For the above reasons, we DENY Arlington's petition for review. We DISMISS San Antonio's petition for review because we lack jurisdiction to consider it.

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[149] *Brazoria Cnty., Tex. v. EEOC*, 391 F.3d 685, 689 (5th Cir. 2004).

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	)	WT Docket No. 08-165

DECLARATORY RULING

Adopted: November 18, 2009
Released: November 18, 2009

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker issuing separate statements.

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I. INTRODUCTION

1. This Declaratory Ruling by the Commission promotes the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks. Wireless operators must generally obtain State and local zoning approvals before building wireless towers or attaching equipment to pre-existing structures. To encourage the expansion of wireless networks, Congress has required these entities to act "within a reasonable period of time" on such requests.[1] In many cases, delays in the zoning process have hindered the deployment of new wireless infrastructure.[2] Accordingly, today we define timeframes for State and local action on wireless facilities siting requests, while also preserving the authority of

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[1] 47 U.S.C. § 332(c)(7)(B)(ii).

[2] *See* para. 33, *infra*.

States and localities to make the ultimate determination on local zoning and land use policies.

2. On July 11, 2008, CTIA – The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a Declaratory Ruling clarifying provisions in Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended (Communications Act), regarding State and local review of wireless facility siting applications (Petition).[3] The Petition raises three issues: the timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers. In this Declaratory Ruling, we grant the Petition in part and deny it in part to ensure that both localities and service providers may have an opportunity to make their case in court, as contemplated by Section 332(c)(7) of the Act.[4]

3. Wireless services are central to the economic, civic, and social lives of over 270 million Americans.[5] Americans are now in the transition

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[3] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Petition for Declaratory Ruling*, filed July 11, 2008 ("Petition").

[4] 47 U.S.C. § 332(c)(7).

[5] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of

toward increasing reliance on their mobile devices for broadband services, in addition to voice services.[6] Without access to mobile wireless networks, however, consumers cannot receive voice and broadband services from providers. Providers continue to build out their networks to provide such services, and a crucial requirement for providing those services is obtaining State and local governmental approvals for constructing towers or attaching transmitting equipment to pre-existing structures. While Section 332(c)(7) of the Communications Act preserves the authority of State and local governments with respect to such approvals, Section 332(c)(7) also limits such State and local authority, thereby protecting core local and State government zoning functions while fostering infrastructure build out.

4. The first part of this Declaratory Ruling concludes that we should define what is a presumptively "reasonable time" beyond which inaction on a siting application constitutes a "failure to act." In defining this timeframe, we have taken several measures to ensure that the reasonableness of the

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Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services, WT Docket No. 09-66, *Notice of Inquiry*, 24 FCC Rcd 11357, 11358 ¶ 2 (2009) ("*Mobile Wireless Competition NOI*"); *see also* Fostering Innovation and Investment in the Wireless Communications Market, GN Docket No. 09-157, A National Broadband Plan For Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 11322 ¶ 1 (2009) ("Wireless communications is one of the most important sectors of our economy and one that touches the lives of nearly all Americans.").

[6] Mobile Wireless Competition NOI, 24 FCC Rcd at 11358 ¶ 2.

time for action "tak[es] into account the nature and scope" of the siting request."[7] In the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v) of the Communications Act, and the court will determine whether the delay was in fact unreasonable under all the circumstances of the case. We conclude that the record supports setting the following timeframes: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations.

5. In the second part of this decision, we find, as the Petitioner urges, that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal wireless service facility siting application because service is available from another provider. Finally, because we have not been presented with any evidence of a specific controversy, we deny the last part of the Petitioner's request, that we find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act.

II. BACKGROUND

6. *The Statute.* Section 332(c)(7) of the Act is titled "Preservation of Local Zoning Authority," and it addresses "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of per-

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[7] 47 U.S.C. § 332(c)(7)(B)(ii).

sonal wireless service facilities."[8] Personal wireless service facilities are defined in Section 332(c)(7)(C)(ii) as "facilities for the provision of personal wireless services,"[9] and personal wireless services are defined in Section 332(c)(7)(C)(i) as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."[10]

7. Subsection (A) states that nothing in the Act limits such authority except as provided in Section 332(c)(7).[11] Subsection (B) identifies those limitations. Among other limitations, Clause (B)(i) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[12] Clause (B)(ii) requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time . . . taking

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[8] 47 U.S.C. § 332(c)(7)(A). Section 332(c)(7) appears in Appendix B in its entirety.

[9] 47 U.S.C. § 332(c)(7)(C)(ii).

[10] 47 U.S.C. § 332(c)(7)(C)(i). "Unlicensed wireless service" is defined as "the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v))." 47 U.S.C. § 332(c)(7)(C)(iii).

[11] 47 U.S.C. § 332(c)(7)(A).

[12] 47 U.S.C. § 332(c)(7)(B)(i).

into account the nature and scope of such request."[13] Clause (B)(v) permits a person adversely affected by any final action or failure to act by the State or local government to commence an action in court within 30 days after such final action or failure to act.[14]

8. Section 253 of the Communications Act contains provisions removing barriers to entry in the provision of telecommunications services.[15] Specifically, Section 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[16] Section 253(d) directs the Commission to preempt any State or local statute, regulation, or legal requirement that it determines, after notice and an opportunity for public comment, violates Section 253(a).[17]

9. *The Petition.* The Petition contends that the ability to deploy wireless systems depends upon the availability of sites for the construction of towers and transmitters. Before a wireless service

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[13] 47 U.S.C. § 332(c)(7)(B)(ii).

[14] 47 U.S.C. § 332(c)(7)(B)(v). In the case of an action or failure to act that is impermissibly based on the environmental effects of radio frequency emissions pursuant to Section 332(c)(7)(B)(iv), a person adversely affected may also petition the Commission for relief. *Id.*

[15] 47 U.S.C. § 253.

[16] 47 U.S.C. § 253(a).

[17] 47 U.S.C. § 253(d).

provider can use a site for a tower or add an antenna to a tower or other structure, zoning approval is generally required at the local level, and the local zoning approval process "can be extremely time-consuming."[18] The Petition asserts that timely deployment of wireless facilities is essential to achieving the Communications Act's public interest goals.[19] According to the Petition, delays in the zoning process for wireless facility siting applications are impeding those goals.[20] The Petition asserts that Section 332(c)(7) of the Communications Act "created a framework in which states and localities could make zoning decisions 'subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.'"[21] The Petition claims that those zoning authorities that do not act in a timely manner are frustrating the goals of the Communications Act.[22]

10. Accordingly, the Petition first requests that the Commission eliminate an ambiguity that CTIA contends currently exists in Section

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[18] Petition at 4.

[19] *Id.* at 8-13. The public interest goals identified by the Petition include nationwide wireless communications services for all Americans, universal service, advanced telecommunications services, broadband deployment, spectrum build-out, and public safety and E911.

[20] *Id.* at 13.

[21] *Id.* at 18 (*citing City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring)).

[22] *Id.* at 19.

332(c)(7)(B)(v) and clarify the time period in which a State or local zoning authority will be deemed to have failed to act on a wireless facility siting application.[23] The Petition requests that the Commission "declare that the failure to render a final decision within 45 days of a filing of a wireless siting application proposing to collocate on an existing facility constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)."[24] Moreover, the Petition requests that the Commission "declare that the failure to render a final decision on any other, non-collocation wireless siting application within 75 days constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)."[25] Relatedly, the Petition asks the Commission to find that, if a zoning authority fails to act within the above timeframes, the application shall be "deemed granted."[26] Alternatively, the Petition requests that the Commission establish a presumption under such circumstances that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.[27]

11. Second, the Petition requests that the Commission clarify that Section 332(c)(7)(B)(i)(II), which forbids State and local facility siting decisions that "prohibit or have the effect of prohibiting the

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[23] *Id.* at 20-23.

[24] *Id.* at 24.

[25] *Id.* at 25-26.

[26] *Id.* at 27-29.

[27] *Id.* at 29-30.

provision of personal wireless services," bars zoning decisions that have the effect of preventing a specific provider from providing service to a location.[28] The Petitioner asserts that this provision prevents a local zoning authority from denying an application based on one or more carriers already serving the geographic area.[29]

12. Third, the Petition requests that the Commission preempt, under Section 253(a) of the Communications Act,[30] local ordinances and State laws that automatically require a wireless service provider to obtain a variance before siting facilities.[31]

13. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested comment on the Petition.[32] After a brief extension, comments were due on September 29, 2008, and replies were due on October 14, 2008.[33] Hundreds of comments

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[28] *Id.* at 30-35 (*citing* 47 U.S.C. § 332(c)(7)(B)(i)(II)).

[29] *Id.* at 31-34.

[30] 47 U.S.C. § 253(a).

[31] Petition at 35-37.

[32] Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008).

[33] Comments originally were due on September 15, 2008, and replies were due on September 30, 2008. Several interested parties requested additional time to submit comments and replies. While the WTB found that the requests had not

and replies were filed in response to the Public Notice, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.[34]

14. Industry commenters generally support the Petition in all respects.[35] They argue that the Commission has the authority to interpret Section 332(c)(7)[36] and that the Commission's definition of the reasonable timeframes for State and local governments to process facility siting applications will promote the deployment of advanced networks, including broadband.[37] Wireless providers assert that without defined timeframes for State and local gov-

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established good cause for the full extensions desired, the WTB granted a short extension in order to permit interested parties additional time "to file more thorough and thoughtful comments, which should lead to a more complete and better-informed record." Wireless Telecommunications Bureau Grants Extension Of Time To File Comments On CTIA's Petition For Declaratory Ruling Regarding Wireless Facilities Siting, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 13386 (WTB 2008).

[34] *See generally* WT Docket No. 08-165. The major commenters and the short forms by which they are cited are listed in Appendix A. Brief comments are not listed but are considered in this Declaratory Ruling.

[35] *See, e.g.*, Verizon Wireless Comments; AT&T Comments; Rural Cellular Association Comments; PCIA – The Wireless Infrastructure Association Comments.

[36] *See, e.g.*, Sprint Nextel Comments at 8; T-Mobile Comments at 12; MetroPCS Comments at 5-6.

[37] *See, e.g.*, MetroPCS Comments at 6-7; NextG Networks Comments at 4.

ernments to process personal wireless service facility siting applications, they face undue delay in some localities.[38] They further argue that timeframes are necessary so that they know when they should seek redress from courts for State and local governments' failure to act in a timely manner.[39] They claim that the Petitioner's proposed timetables are fair and should be used to define the "reasonable period of time" for State and local governments to process facility siting applications in Section 332(c)(7)(B)(ii).[40]

15. State and local governments, as well as airport authorities, oppose the Petition. As an initial matter, they contend that Congress gave the courts, rather than the Commission, the authority to interpret Section 332(c)(7) of the Communications Act, and they cite statutory text and legislative history in support of their contention.[41] Thus, they contend that the Commission lacks the authority to determine what is a "reasonable period of time" and when a "failure to act" or a "prohibition of service" has occurred.[42] State and local government commenters

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[38] *See, e.g.*, Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6.

[39] *See, e.g.*, CalWA Comments at 4; Rural Cellular Association Comments at 4; T-Mobile Comments at 9-10.

[40] *See, e.g.*, Rural Cellular Association Comments at 4-5; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.

[41] *See, e.g.*, NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15.

[42] *See, e.g.*, Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2-

further argue that both "reasonable period of time" and "failure to act" have clear meanings, and that Congress deliberately used these general terms to preserve State and local government flexibility to process applications within the typical timeframes based on the individual circumstances of each case.[43] These commenters also oppose either deeming an application granted in the event of a zoning authority's "failure to act" or establishing a presumption entitling an applicant to a court-ordered injunction granting the application.[44]

16. The Petitioner requests that the Commission apply Section 253(a) of the Communications Act to preempt local ordinances and State laws that automatically require a wireless service provider to obtain a variance before siting facilities. In addressing this request, State and local government commenters argue that Section 253(a) cannot be applied to such ordinances because under Section 332(c)(7)(A), "[n]othing in [the Communications] Act" outside of Section 332(c)(7) shall limit State or local authority over personal wireless service facilities siting decisions.[45] The EMR Policy Institute (EMRPI)

3; Coalition for Local Zoning Authority Comments at 10-11; NATOA et al. Reply Comments at 7-9.

[43] *See, e.g.*, NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4, 15-20; City of Dublin, OH Comments at 2-3; California Cities Comments at 13-16.

[44] *See, e.g.*, California Cities Comments at 17-21; NATOA et al. Comments at 15-18; SCAN NATOA Comments at 11-12.

[45] *See, e.g.*, NATOA et al. Comments at 7; California Cities

filed a Comment and Cross-Petition that, *inter alia*, seeks a declaratory ruling relating to the Commission's regulations regarding exposure to radio frequency emissions.[46]

17. Since the filing of the Petition, Congress passed the American Recovery and Reinvestment Act of 2009 (Recovery Act).[47] The Recovery Act directs the Commission to create a national broadband plan by February 17, 2010, that seeks to ensure that every American has access to broadband capability and establishes clear benchmarks for meeting that goal.[48] To this end, on April 8, 2009, the Commission initiated a Notice of Inquiry (NOI) seeking comment on the best approach to developing this Plan, the interpretation of key statutory terms, and a number of specific policy goals.[49] Some commenters that filed in response to the NOI also filed their comments in the instant docket, arguing that the grant of the Petition will promote the availability of wireless broadband services.[50] The Petitioner par-

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Comments at 23-24; Fairfax County, VA Comments at 3; Michigan Municipalities Comments at 2; N.C. Assoc. of County Commissioners Comments at 1-2.

[46] *See* EMRPI Comments and Cross-Petition.

[47] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act).

[48] Recovery Act § 6001(k).

[49] *See generally* A National Broadband Plan for Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 4342 (2009).

[50] *See* CTIA Comments, GN Docket No. 09-51, at 15-19 (filed June 8, 2009); PCIA and The DAS Forum Comments, GN

ticularly notes that the delays experienced by wireless providers for wireless service facility siting applications are frustrating the deployment of wireless broadband services to millions of Americans.[51]

III. DISCUSSION

18. Under Section 1.2 of the rules, the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."[52] The Commission has broad discretion whether to issue such a ruling.[53]

19. Below, we address the three issues raised in CTIA's Petition. On the first issue, we conclude that we should define what constitutes a presumptively "reasonable period of time" beyond which inaction on a personal wireless service facility siting application will be deemed a "failure to act." We then determine that in the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in

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Docket 09-51, at 5-6 (filed June 8, 2009); CTIA Reply Comments, GN Docket No. 09-51, at 13-15 (filed July 21, 2009); Google Inc. Reply Comments, GN Docket 09-51, at 40-41 (filed July 21, 2009).

[51] CTIA Comments, GN Docket No. 09-51, at 18 (filed June 8, 2009).

[52] 47 C.F.R. § 1.2.

[53] *See Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973); Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, CC Docket No. 95-116, *Order*, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).

court under Section 332(c)(7)(B)(v). At that point, the State or local government will have the opportunity to present to the court arguments to show that additional time would be reasonable, given the nature and scope of the siting application at issue. We next conclude that the record supports setting the time limits at 90 days for State and local governments to process collocation applications, and 150 days for them to process applications other than collocations. On the second issue raised by the Petition, we find that it is a violation of Section 332(c)(7)(B)(i)(II) for a State or local government to deny a personal wireless service facility siting application solely because that service is available from another provider. On the third issue, because the Petitioner has not presented us with any evidence of a specific controversy, we deny its request that we find that a State or local regulation that explicitly or effectively requires a variance or waiver for every wireless facility siting violates Section 253(a). Finally, we address other issues raised in the record, including dismissal of the EMRPI Cross-Petition.

A. Authority to Interpret Section 332(c)(7)

20. *Background.* The Petition claims that the Commission has the authority to interpret ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling.[54] Wireless providers support the Petition's assertion, arguing that the courts have upheld similar interpretive authority in other contexts. These comment-

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[54] Petition at 20-24.

ers rely in particular on *Alliance for Community Media v. FCC*,[55] in which the Sixth Circuit upheld the Commission's establishment of a timeframe for local authorities to process cable franchise applications.[56]

21. State and local government commenters disagree, arguing that the statutory text and the legislative history evince congressional intent to deny the Commission such authority.[57] Specifically, State and local government commenters argue that in expressly preserving State and local government authority over personal wireless service facility siting decisions, subject only to the specific limitations stated in Section 332(c)(7), Congress withheld preemptive authority from the Commission.[58] Accordingly, they argue that the Commission does not have the authority to interpret Section 332(c)(7). They contend that the legislative history of Section 332(c)(7) further demonstrates this intent, as Congress indicated that "any pending rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of CM[R]S facilities should be terminated."[59] Other

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[55] 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2821 (2009) ("*Alliance for Community Media*").

[56] *See, e.g.*, Sprint Nextel Comments at 8; T-Mobile Comments at 12; MetroPCS Comments at 5-6.

[57] *See, e.g.*, NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15.

[58] *See, e.g.*, NATOA et al. Comments at 1-5.

[59] *Id.* at 9-10 (*citing* H.R. Conf. Rep. No. 104-458, at 208)

State and local government commenters assert that because the courts have exclusive jurisdiction over all disputes arising under Section 332(c)(7) (except for those relating to RF emissions), Congress did not contemplate any role for the Commission in the State and local zoning approval process. Thus, they argue, the Commission lacks the authority to determine what constitutes a "reasonable period of time," "failure to act," or "prohibiti[on of] the provision of personal wireless services."[60]

22. In its Reply, the Petitioner disputes the claim that Congress "left in place the complete autonomy of States and localities with respect to zoning."[61] The Petitioner argues that "it is *Congress* that expressly inserted such federal concerns into the tower siting process, limiting traditional local authority, when it promulgated Section 332(c)(7)" in order to reduce delays and impediments at the State and local level.[62] Accordingly, the Petitioner argues that the Commission's interpretation of Section 332(c)(7) does not contravene that section's reservation to State and local governments of authority to

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(NATOA emphasis removed). NATOA et al. argues that Congress did not mean to address only those rulemakings in play in 1996, but any future rulemakings on personal wireless service facility issues. *Id.* at 10.

[60] *See, e.g.*, Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2; NATOA et al. Reply Comments at 7-9; Coalition for Local Zoning Authority Comments at 10-11.

[61] CTIA Reply Comments at 12.

[62] *Id.* at 12-13 (emphasis in original).

review personal wireless service facility siting applications to the extent not limited by Section 332(c)(7).[63] Moreover, the Petitioner counters in its Reply that the Petition is not a challenge to a specific siting decision; thus, Section 332(c)(7)(B)(v)'s requirement that all controversies regarding siting decisions (other than those involving RF emissions) should be heard in the courts does not apply here.[64] The Petitioner also asserts that the Sixth Circuit's decision in *Alliance for Community Media v. FCC* rejected the argument that the Commission's implementation of a timeframe in the local franchising regime "improperly intruded on decisions left by Congress to the courts."[65]

23. *Discussion.* We agree with the Petitioner that the Commission has the authority to interpret Section 332(c)(7). Congress delegated to the Commission the responsibility for administering the Communications Act. Section 1 of the Act directs the Commission to "execute and enforce the provisions of this Act" in order to, *inter alia*, regulate and promote communication "by wire and radio" on a nationwide basis.[66] Moreover, Section 201(b) of the Act

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[63] *Id.* The Petitioner also contends that it does not request that the Commission "condition or limit the scope of a zoning authority's review of a tower siting application," or that the Commission "preempt a zoning authority's review of an application." *Id.* at 2.

[64] *Id.* at 21-22.

[65] *Id.* at 22.

[66] 47 U.S.C. § 151.

authorizes the Commission "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[67] Further, Section 303(r) of the Communications Act states that "the Commission from time to time, as public convenience, interest or necessity requires shall ... [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[68] Finally, Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[69] These grants of authority necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular.

24. This finding is consistent with our decision in the *Local Franchising Order*, in which we held that the Commission has clear authority to interpret what it means for a local government to "unreasonably refuse to award" a franchise to a cable

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[67] 47 U.S.C. § 201(b). *See also National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act, §151, and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act, §201(b).").

[68] 47 U.S.C. § 303(r).

[69] 47 U.S.C. § 154(i).

operator in Section 621(a)(1) of the Act.[70] That decision has been upheld by the U.S. Court of Appeals for the Sixth Circuit in *Alliance for Community Media v. FCC*. In that case, the court found that the Supreme Court's precedent in *AT&T Corp. v. Iowa Utilities Board*[71] controlled, and it held that the Commission "possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1)" pursuant to its authority under Section 201(b) to carry out the provisions of the Communications Act.[72] The Court held that "the statutory silence in section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules in-

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[70] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101, 5128 ¶ 54 (2007) ("*Local Franchising Order*") (interpreting Section 621(a)(1) of the Act, which prohibits local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises, and holding that if a local franchising authority fails to act on an application for a local franchise within 90 days for an applicant that already has access to rights-of-way or 6 months for all other applicants, then an interim franchise will be deemed granted until the franchising authority takes action on the application).

[71] 525 U.S. 366 (1999) (finding, *inter alia*, that the Commission has the authority to carry out provisions of the Act, including the local competition provisions added by the Telecommunications Act of 1996).

[72] 529 F.3d at 773-74.

terpreting that provision."[73] The same holds true here. Section 332(c)(7) falls within the Act; accordingly, the Commission has the authority to interpret it.

25. We disagree with State and local government commenters that our interpreting the limitations that Congress imposed on State and local governments in Section 332(c)(7) is the same as imposing *new* limitations on State and local governments. Our interpretation of Section 332(c)(7) is not the imposition of new limitations, as it merely interprets the limits Congress already imposed on State and local governments. Moreover, the legislative history does not establish that the Commission is prohibited from interpreting the provisions of Section 332(c)(7). The Conference Report states that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated."[74] We read the legislative history as intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7). Our actions herein will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification. State

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[73] *Id.* at 774.

[74] H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

and local governments will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A). Under Section 332(c)(7)(B)(iii), they may deny such applications if the denial is "supported by substantial evidence contained in a written record."[75] However, State and local governments must act upon personal wireless service facility siting applications "within a reasonable period of time" as defined herein, and must not prohibit one carrier's provision of service based on the availability of service from another carrier, or applicants may commence an action in a court of competent jurisdiction pursuant to Section 337(c)(7)(B)(v).

26. Moreover, we find that Section 332(c)(7)(B)(v) does not limit our authority to interpret Section 332(c)(7). Section 332(c)(7)(B)(v) states that "[a]ny person adversely affected by any final action or failure to act by a State or local government . . . may . . . commence an action in any court of competent jurisdiction."[76] State and local governments argue that Congress gave the courts, not the Commission, exclusive jurisdiction to interpret and enforce Section 332(c)(7). This is the same argument that we rejected in the *Local Franchising Order*. In that decision, we held that "[t]he mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its other-

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[75] 47 U.S.C. § 332(c)(7)(B)(iii).

[76] 47 U.S.C. § 332(c)(7)(B)(v).

wise undeniable rulemaking authority."[77] The Sixth Circuit agreed, holding that "the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1)."[78] Accordingly, the fact that Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7).

B. Time for Acting on Facility Siting Applications

27. *Background.* Section 332(c)(7)(B)(ii) of the Communications Act states that State or local governments must act on requests for personal wireless service facility sitings "within a reasonable period of time."[79] Section 332(c)(7)(B)(v) further provides that "[a]ny person adversely affected by any final action or failure to act"[80] by a State or local government on a personal wireless service facility siting application "may, within 30 days after such action or failure to act, commence an action in any

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[77] *Local Franchising Order*, 22 FCC Rcd at 5129 ¶ 56 (2007).

[78] *Alliance for Community Media*, 529 F.3d at 775 (finding that this conclusion was supported by the Supreme Court's decision in *AT&T Corp. v. Iowa Util. Bd.* upholding the Commission's authority to issue rules governing the States' resolution of interconnection arbitrations).

[79] 47 U.S.C. § 332(c)(7)(B)(ii).

[80] 47 U.S.C. § 332(c)(7)(B)(v).

court of competent jurisdiction."[81] The Petition asserts that the Commission has the authority to and should define the timeframes by which State and local governments must process personal wireless service facility siting applications.[82] The Petition claims that in the absence of timeframes, it is unclear when a State or local government has failed to act under the statute. Thus, an aggrieved party wishing to challenge a State or local government's failure to act could miss the 30-day statute of limitations through no fault of its own.[83] The Petition proposes that the Commission declare that a State or local government has failed to act if it does not render a final decision on a collocation application within 45 days or on any other application within 75 days. The Petition asserts that the Commission should declare that, if a zoning authority fails to act within the prescribed timeframes, the application shall be "deemed granted."[84] In the absence of such relief, the Petition argues, the lengthy litigation process would deprive the applicant of its ability to construct within a reasonable time, as provided by the statute.[85] Alternatively, the Petition requests that the Commission establish a presumption that entitles an applicant to a court-ordered injunction granting the application, unless the local zoning au-

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[81] Id.

[82] Petition at 20-24.

[83] *Id.* at 20.

[84] *Id.* at 27-28.

[85] *Id.* at 28-29.

thority can demonstrate that the delay was reasonable.[86]

28. State and local government commenters assert that both "reasonable period of time" and "failure to act" are clear terms and that Congress used these general terms because it wanted State and local governments to process applications in the timeframes in which land use applications are typically processed. The Act and its legislative history, they contend, establish that the courts, not the Commission, should determine whether such processing is reasonable based on the individual facts in each case.[87] They argue that some applications require greater time to consider than others, and that sufficient time is needed to compile a written record as required by Section 332(c)(7)(B)(iii)[88] and to seek collaborative solutions with wireless providers and the surrounding communities impacted by the proposed wireless service facilities.[89] Finally, they assert that rigid timeframes do not account for time to amend applications that are often incomplete when submitted by wireless providers, and may provide

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[86] *See id.* at 29-30.

[87] *See, e.g.*, NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4; City of Dublin, OH Comments at 2-3.

[88] 47 U.S.C. § 332(c)(7)(B)(iii) (denial of a personal wireless service facility siting application must be rendered "in writing and supported by substantial evidence contained in a written record").

[89] *See, e.g.*, California Cities Comments at 13-16; Florida Cities Comments at 15-20.

incentive for wireless providers to submit incomplete applications and to delay correcting them until the application is "deemed granted" (as proposed by the Petitioner).[90]

29. Wireless providers argue that the Commission has the authority to define "reasonable period of time" and "failure to act," and that such definition is necessary because some State and local governments are unreasonably delaying action on their applications.[91] They further contend that without defined timeframes, it is unclear when governments have failed to act and when they may go to court for redress.[92] They claim that the Petitioner's proposed timetables are reasonable.[93]

30. State and local government commenters also urge the Commission to reject both the "deemed granted" proposal and the alternative presumption in favor of injunctive relief proposed in the Petition.[94] They argue that Congress directed applicants aggrieved by a failure to act to seek a remedy in

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[90] *See, e.g.*, Fairfax County, VA Comments at 13; City of Bellingham, WA Comments at 1-2; Michigan Municipalities Comments at 19-20.

[91] *See, e.g.*, Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6-9.

[92] *See, e.g.*, CalWA Comments at 4; Rural Cellular Association Comments at 4-5; T-Mobile Comments at 9-10.

[93] *See, e.g.*, Rural Cellular Association Comments at 6; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.

[94] *See, e.g.*, California Cities Comments at 17-21; SCAN NATOA Comments at 10-12.

court, and assigned to the courts the task of deciding the appropriate remedy.[95] Moreover, they assert, under the Petitioner's proposed regime, local governments would have no say over siting of facilities once an application is deemed granted, even where safety factors justify modification or rejection of the facility.[96]

31. Sprint Nextel proposes that the Commission adopt the alternative remedy in the Petition. It argues that a presumptive grant is consistent with the Commission's approach in the *Local Franchising Order*, in which the Commission did not deem a franchise application granted, but provided for an interim authorization, upon the local government's failure to act upon an application in a timely fashion.[97] The Petitioner argues in its Reply that because a State or local authority's failure to act within a reasonable time is specifically declared unlawful under the statute, an automatic grant is appropriate.[98]

32. *Discussion.* The evidence in the record demonstrates that personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is

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[95] *See, e.g.*, Florida Cities Comments at 6; University of Michigan Comments at 3-4.

[96] *See, e.g.*, Stokes County, N.C. Comments at 2.

[97] Sprint Nextel Comments at 9-11 (*citing Local Franchising Order*, 22 FCC Rcd 5101, 5139 (2007)).

[98] CTIA Reply Comments at 26.

impeding the deployment of advanced and emergency services. To provide guidance, remove uncertainty and encourage the expeditious deployment of wireless broadband services, we therefore determine that it is in the public interest to define the time period after which an aggrieved party can seek judicial redress for a State or local government's inaction on a personal wireless service facility siting application. Specifically, we find that a "reasonable period of time" is, presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications. Accordingly, if State or local governments do not act upon applications within those timeframes, then a "failure to act" has occurred and personal wireless service providers may seek redress in a court of competent jurisdiction within 30 days, as provided in Section 332(c)(7)(B)(v). The State or local government, however, will have the opportunity to rebut the presumption of reasonableness.[99]

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[99] We note that the operation of this presumption differs significantly from the Petitioner's alternative proposal that the Commission establish a presumption in favor of a court-ordered injunction granting the application. Under the approach we are adopting today, if a court finds that the State or local authority has failed to rebut the presumption that it failed to act within a reasonable time, the court would then review the record to determine the appropriate remedy. The State or local authority's exceeding a reasonable time for action would not, in and of itself, entitle the siting applicant to an injunction granting the application. *See* para. 39, *infra*.

33. Need for Action. Initially, we find that the record shows that unreasonable delays are occurring in a significant number of cases. The Petition states that based on data the Petitioner compiled from its members, there were then more than 3,300 pending personal wireless service facility siting applications before local jurisdictions.[100] "Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years.*"[101] Moreover, almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years.[102] In addition, several wireless providers supplemented the record with their individual experiences in the personal wireless service facility siting application process. For example, Sprint Nextel asserts that the typical processing times for personal wireless service facility siting applications range from 28 to 36 months in several California communities.[103] Verizon Wireless asserts

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[100] Petition at 15.

[101] *Id.* (emphasis in original).

[102] *Id.* The Petition claims that in "many jurisdictions" it was taking longer to obtain personal wireless service facility approvals than in prior years. *Id.*

[103] Sprint Nextel Comments at 5. Sprint Nextel also notes problems with processing in a New Jersey community. *Id.* The California Wireless Association also describes several instances of delays that ranged from 16 months to two years in California. CalWA Comments at 2-3.

that "in Northern California, 27 of 30 applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved"; and that "in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months."[104] NextG Networks describes delays of 10 to 25 months for its proposals to place facilities in public rights-of-way, and states that such delay occurred even when NextG Networks merely sought to replace old equipment.[105] Moreover, two wireless providers offer evidence that the personal wireless service facility siting applications process is getting longer in several jurisdictions. For example, T-Mobile contends that in Maryland, the typical zoning process went from two months to nine months in four years and in Florida, from two months to nine months in two years.[106]

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[104] Verizon Wireless Comments at 6-7. T-Mobile also cites specific problems it encountered in four States. T-Mobile Comments at 7-9. Likewise, MetroPCS describes its experience with application processing delays in four jurisdictions. MetroPCS Comments at 8-12.

[105] NextG Networks Comments at 5-8.

[106] T-Mobile Comments at 6. In its comments, T-Mobile also references a collocation application submitted in LaGrange, New York, that was denied following a lengthy review process, despite the fact that the existing tower was designed to accommodate multiple carriers and no height increase was required to hold the proposed installation. T-Mobile Comments at 26 (Declaration of Sabrina Bordin-Lambert). T-Mobile appealed the denial to the U.S. District Court, and the Court ruled in favor of T-Mobile and issued a permanent injunction directing the town to issue all necessary approvals to permit T-

Verizon Wireless notes that in the Washington, D.C. metro area, the typical processing time for new tower applications increased from six to nine months in 2003 to more than one year in 2008, and the processing of collocation applications increased from 15 to 30 days in 2003 to more than 90 days in 2008.[107]

34. This record evidence demonstrates that unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services.[108] Many wireless

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Mobile's antenna collocation within 90 days. *Omnipoint Communications, Inc. v. Town of LaGrange*, No. 08 Civ. 2201(CM)(GAY) (S.D.N.Y. Aug. 31, 2009). As support for the injunction, the Court cited the town's specific actions that resulted in a lengthy, five-year delay that ultimately prevented T-Mobile from filling an important gap in service. *Id.*

[107] Verizon Wireless Comments at 6. Moreover, both T-Mobile and Verizon Wireless provide information concerning pending applications. T-Mobile asserts that nearly one-third of its then 706 collocation applications had been pending for more than one year, and 114 of those had been pending for more than three years. T-Mobile Comments at 7. T-Mobile had 571 pending new tower applications, more than 30 percent of which had been pending for more than one year, and more than 25 of these applications had been pending for more than three years. *Id.* Verizon Wireless states that data it gathered "indicates that of the over 400 collocation requests reported as pending, over 30% of the requests [were] pending for more than six months." Verizon Wireless Comments at 6. In addition, it claims that "[o]f the over 350 non-collocation requests reported as pending, more than half of those applications [were] pending for more than 6 months, and nearly 100 of those applications [were] pending for more than one year." *Id.*

[108] We note that very late in the process, Petitioner and its supporters submitted new evidence in the form of letters and

providers have faced lengthy and costly processing. We disagree with State and local government commenters that argue that the Petition fails to provide any credible or probative evidence that any local government is engaged in delay with respect to processing personal wireless service facility siting applications,[109] and that there is insufficient evidence on

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affidavits from carrier representatives that discuss specific experiences. *See Ex Parte* Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA -- The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, filed November 10, 2009, Attached Letters from Michael S. Giaimo, Thomas C. Greiner, Jr., Scott P. Olson, Paul B. Albritton, and John W. Nilon, Jr., and Affidavit of Edward L. Donohue. NATOA and the Coalition for Local Zoning Authority responded that they have had no opportunity to respond to the substance of Petitioner's submissions, and suggested that the Commission should either strike CTIA's submission from the record or postpone action on the Petition until communities named in that submission have been served and given opportunity to respond. *See Ex Parte* Letter of Gerald L. Lederer, Counsel for NATOA and the Coalition for Local Zoning Authority, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, filed November 10, 2009. We strongly encourage parties to submit relevant evidence as early as possible in the course of a proceeding, and preferably within the established pleading schedule, so that it may be subjected to the crucible of a response. Under the circumstances here, we do not give the record evidence contained in Petitioner's November 10 submission weight in our analysis.

[109] NATOA et al. Comments at 22; Stokes County, N.C. Comments at 1. Similarly, the County of Sonoma cites the proliferation of cell phones and towers as evidence that there is no problem and argues that the Commission should first investigate whether processing problems really exist. Sonoma

the record as a whole to justify Commission action.[110] To the contrary, given the extensive statistical evidence provided by the Petitioner and supporting commenters, and the absence of more than isolated anecdotes in rebuttal, we find that the record amply establishes the occurrence of significant instances of delay.[111]

35. Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic

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Comments at 1.

[110] *See, e.g,* Coalition for Local Zoning Authority Reply Comments at 5-7; SCAN NATOA Reply Comments at 2-6; California Cities Reply Comments at 6; NATOA et al. Reply Comments at 15.

[111] The City of Philadelphia argues that the Petitioner's failure to identify and serve those local governments toward which its allegations are directed deprives those governments of a meaningful opportunity to verify or contest the Petitioner's allegations and deprives the Commission of a fair and full record. City of Philadelphia Comments at 2-3. *See also* Coalition for Local Zoning Authority Reply Comments at 5; Greater Metro Telecom. Consortium *et al.* Reply Comments at 6. We agree that an opportunity for rebuttal is an important element of process before making a finding regarding any individual community's processes. Today's decision provides such an opportunity for rebuttal by establishing presumptively reasonable timeframes that will allow the reasonableness of any particular failure to act to be litigated. The record shows that the State and local government community has had ample opportunity to respond to the aggregate evidence that supports our decision.

areas in a timely fashion.[112] Wireless providers currently are in the process of deploying broadband networks which will enable them to compete with the services offered by wireline companies.[113] For example, Clearwire is deploying a next generation broadband wireless network for the 2.5 GHz band using the Worldwide Inter-Operability for Microwave Access (WiMAX) technology.[114] Clearwire asserts that its WiMAX network will "provide a true mobile broadband experience for consumers, small businesses, medium and large enterprises, public safety

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[112] *See* Petition at 8-10.

[113] The Petitioner has submitted a study which asserts that approximately 23.2 million U.S. residents and 42% of road miles in the U.S. do not currently have access to 3G mobile broadband services. It further estimates that approximately 16,000 new towers will need to be constructed and 55,000 existing towers will need to be augmented for both Code Division Multiple Access (CDMA) and Global System for Mobile communications (GSM) 3G broadband services to be ubiquitous to U.S. consumers. CostQuest Associates, Inc., U.S. Ubiquity Mobility Study, April 17, 2008 at 4, filed as attachment to CTIA Ex Parte, GN Docket No. 09-51, WT Docket Nos. 08-165, 08-166, 08-167, 09-66 (filed Aug. 14, 2009).

[114] *Sprint And Clearwire To Combine WiMAX Businesses, Creating A New Mobile Broadband Company*, News Release, Sprint Nextel and Clearwire Corp., May 7, 2008 ("*Sprint/Clearwire News Release*"). *See* Sprint Nextel Corp. and Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94 and File Nos. 0003462540 et al., *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17619 ¶ 128 (2008) (approving Clearwire and Sprint Nextel's plan to combine their 2.5 GHz wireless broadband businesses into one company).

organizations and educational institutions."[115] Similarly, we expect that the winners of recent spectrum auctions will need facility siting approvals in order to deploy their services to consumers.[116] At least one Advanced Wireless Service (AWS) licensee with nationwide reach already is implementing its new network in the AWS band.[117] Moreover, in the 700 MHz band, the Commission adopted stringent build out requirements precisely to ensure the rapid and widespread deployment of services over this spectrum.[118] State and local practices that unreasonably

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[115] *Sprint/Clearwire News Release.* Clearwire's wireless broadband service is now available in 14 markets. *Clearwire Introduces CLEAR(TM) 4G WiMax Internet Service in 10 New Markets*, Press Release, Clearwire, Sept. 1, 2009.

[116] *See* Auction of Advanced Wireless Services Licenses Closes: Winning Bidders Announced for Auction No. 66, Report No. AUC-06-66-F, *Public Notice*, 21 FCC Rcd 10521 (WTB 2006); Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction 73, *Public Notice*, Report No. AUC-08-73-I (Auction 73), DA 08-595 (rel. Mar. 20, 2008).

[117] T-Mobile Comments at 2 (noting that unless it can expeditiously obtain approvals, its efforts to add high-speed services and expand coverage will be "significantly hampered").

[118] *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309; Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket

delay the siting of personal wireless service facilities threaten to undermine achievement of the goals that the Commission sought to advance in these proceedings. Moreover, they impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996[119] and more recently in the Recovery Act.[120]

36. In addition, the deployment of facilities without unreasonable delay is vital to promote public safety, including the availability of wireless 911, throughout the nation. The importance of wireless communications for public safety is critical, especially as consumers increasingly rely upon their personal wireless service devices as their primary method of communication. As NENA observes in its comments:

> Calls must be able to be made from as many locations as possible and dropped calls must be prevented. This is especially

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No. 06-169; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86; and Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15342-55 ¶¶ 141-177 (2007).

[119] Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934.

[120] *See supra* note 47.

> true for wireless 9-1-1 calls which must get through to the right Public Safety Answering Point ("PSAP") and must be as accurate as technically possible to ensure an effective response. Increased availability and reliability of commercial and public safety wireless service, along with improved 9-1-1 location accuracy, all depend on the presence of sufficient wireless towers.[121]

37. Right to Seek Relief. Given the evidence of unreasonable delays and the public interest in avoiding such delays, we conclude that the Commission should define the statutory terms "reasonable period of time" and "failure to act" in order to clarify when an adversely affected service provider may take a dilatory State or local government to court. Specifically, we find that when a State or local government does not act within a "reasonable period of time" under Section 332(c)(7)(B)(i)(II), a "failure to act" occurs within Section 332(c)(7)(B)(v). And because an "action or failure to act" is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on an application. We expect that this certainty will enable personal wireless service providers more vigorously to enforce the statutory mandate against unreasonable delay that impedes the deployment of services that benefit the public. At the same time, our action will provide guidance to

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[121] NENA Comments at 1-2.

State and local governments as to what constitutes a reasonable timeframe in which they are expected to process applications, but recognizes that certain cases may legitimately require more processing time.[122]

38. By defining the period after which personal wireless service providers have a right to seek judicial relief, we both ensure timely State and local government action and preserve incentives for providers to work cooperatively with them to address community needs. Wireless providers will have the incentive to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable, or they will incur the costs of litigation and may face additional delay if the court determines that additional time was, in fact, reasonable under the circumstances. Similarly, State and local governments will have a strong incentive to resolve each application within the timeframe defined as reasonable, or they will risk issuance of an injunction granting the application. In addition, specific timeframes for State and local government deliberations will allow wireless providers to better plan and allocate resources. This is especially important as providers plan to deploy their new broadband networks.

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[122] We recognize that there are numerous jurisdictions that are processing personal wireless service facility siting applications well within the timeframes we establish herein. We encourage these jurisdictions to continue their expeditious processing of applications for the benefit of wireless consumers.

39. We reject the Petition's proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis."[123] This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies. As the Petitioner notes, many courts have issued injunctions granting applications upon finding a violation of Section 332(c)(7)(B).[124] However, the case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs.[125] To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case.[126] While we agree that injunc-

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[123] 47 U.S.C. § 332(c)(7)(B)(v).

[124] *See* Petition at 28; CTIA Reply Comments at 23-25.

[125] We note that many of the cases the Petitioner cites involved not a failure to act within a reasonable time, but a lack of substantial evidence or other violation of Section 332(c)(7)(B). *See, e.g., New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002).

tions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.

40. We also disagree with commenters that argue that the statutory scheme precludes us from interpreting the terms "reasonable period of time" and "failure to act" by reference to specific timeframes. State and local government commenters assert that Congress used these general terms, rather than setting specific time periods in the Act, because it wanted to preserve State and local governments' discretion to process applications in the timeframes in which each government typically processes land use applications. They contend that this reading comports with the complete text of Section 332(c)(7)(B)(ii), which obligates the State or local government to act "within a reasonable period of time after the request is duly filed . . . *taking into account the nature and scope of such request.*"[127]

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[126] See *Tennessee ex rel. Wireless Income Props. v. Chattanooga*, 403 F.3d 392 (6th Cir. 2005); *Masterpage Communications, Inc. v. Town of Olive, NY*, 418 F.Supp.2d 66 (N.D.N.Y. 2005).

[127] 47 C.F.R. § 332(c)(7)(B)(ii) (emphasis added). *See* NATOA et al. Comments at 14-15; California Cities Comments at 5-6; Fairfax County, VA Comments at 6-7; City of Dublin, OH Comments at 3; City of Grove City, OH Comments at 3; Florida Cities Comments at 5-6; City of Burien, WA Comments at 4; Village of Alden, NY Comments at 3.

Moreover, these commenters rely upon the Conference Agreement, which states that "the time period for rendering a [personal wireless service facility siting] decision will be the usual period under such circumstances" and that "[i]t is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision[s]."[128]

41. Particularly given the opportunities that we have built into the process for ensuring individualized consideration of the nature and scope of each siting request, we find these arguments unavailing. Congress did not define either "reasonable period of time" or "failure to act" in the Communications Act. As the United States Court of Appeals for the District of Columbia Circuit has held, the term "reasonable" is ambiguous and courts owe substantial deference to the interpretation that the Commission accords to ambiguous terms.[129] We similarly

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[128] H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

[129] *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). In this case the court stated: "[b]ecause 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them." The court upheld the Commission's rejection of a competitive carrier's proposed tariff as patently unlawful because it was not "just and reasonable" under Section 201(b) of the Act. *See also National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. at 982-84 (finding that where a statute is ambiguous and the implementing agency's construction is reasonable, a

found in the *Local Franchising Order* that the term "unreasonably refuse to award" a local franchise authorization in Section 621(a)(1) is ambiguous and subject to our interpretation.[130] As in the local franchising context, it is not clear from the Communications Act *what* is a reasonable period of time to act on an application or *when* a failure to act occurs. As we find above, by defining timeframes in this proceeding, the Commission will lend clarity to these provisions, giving wireless providers and State and local zoning authorities greater certainty in knowing what period of time is "reasonable," and ensuring that the point at which a State or local authority "fails to act" is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress.

42. Moreover, our construction of the statutory terms "reasonable period of time" and "failure to act" takes into account, on several levels, the Section 332(c)(7)(B)(ii) requirement that the "nature and scope" of the request be considered and the legislative history's indication that Congress intended the decisional timeframe to be the "usual period" under the circumstances for resolving zoning matters. First, the timeframes we define below are based on actual practice as shown in the record. As discussed below, most statutes and government processes discussed in the record already conform to the time-

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federal court must accept the agency's construction of the statute, even if the agency's interpretation differs from prior judicial construction).

[130] *Local Franchising Order*, 22 FCC Rcd at 5130 ¶ 58 (2007).

frames we define. As such, the timeframes do not require State and local governments to give preferential treatment to personal wireless service providers over other types of land use applications. Second, we consider the nature and scope of the request by defining a shorter timeframe for collocation applications, consistent with record evidence that collocation applications generally are considered at a faster pace than other tower applications. Third, under the regime that we adopt today, the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable. Finally, we have provided for further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including where the applicant and the State or local authority agree to extend the time, where the application has already been pending for longer than the presumptive timeframe as of the date of this Declaratory Ruling, and where the application review process has been delayed by the applicant's failure to submit a complete application or to file necessary additional information in a timely manner.[131] For all these reasons, we conclude that our clarification of the broad terms "reasonable period of time" and "failure to act" is consistent with the statutory scheme.

43. Timeframes Constituting a "Failure to Act". The Petition proposes a 45-day timeframe for collocation applications and a 75-day timeframe for

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[131] *See infra* paras. 49-53.

all other applications.[132] The Petition asserts that because no new towers need to be constructed, collocations are the easiest applications for State and local governments to review and, therefore, should reasonably be reviewed within a shorter period.[133] The Petitioner surveyed its members and found that collocations can take as little as a single day to review, and that all members responding had received zoning approvals within 14 days.[134] With respect to new facilities or major modifications, the Petitioner's members indicated that they had received final action "in as little as one day, with hundreds of grants within 75 days."[135] Wireless providers argue that the Petitioner's proposed timeframes are reasonable,[136] and they rely upon State and local processes as evidence to support that conclusion.[137] Moreover,

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[132] Petition at 24-27. The Petition claims that over 80 percent of carriers surveyed had had "some collocations granted within one week" and new builds "granted within 2 weeks." Petition at 16.

[133] *Id.* at 24-25.

[134] *Id.* at 25.

[135] *Id.* at 26. All members responding to the survey reported receiving approvals for new facilities within 30 days. *Id.*

[136] *See, e.g.*, MetroPCS Comments at 12; Rural Cellular Association Comments at 6; NextG Networks Comments at 9-12.

[137] Sprint Nextel Comments at 6-8 (*citing* to South Dakota Public Utility Commission's model wireless zoning ordinance and Florida and North Carolina statutes); T-Mobile Comments at 11-12 (*citing* to the processing experienced by T-Mobile in Florida, Georgia, and Texas); MetroPCS Comments at 7-8

there is evidence from local governments that they are able to decide promptly personal wireless service facility siting applications. For example, the City of Saint Paul, Minnesota, has processed personal wireless service facility siting applications within 13 days, on average, since 2000,[138] and the City of La-Grande, Oregon, has processed applications on average in 45 days in the last ten years.[139]

44. While we recognize that many applications can and perhaps should be processed within the timeframes proposed by the Petitioner, we are concerned that these timeframes may be insufficiently flexible for general applicability. In particular, some applications may reasonably require additional time to explore collaborative solutions among the governments, wireless providers, and affected communities.[140] Also, State and local governments may sometimes need additional time to prepare a written explanation of their decisions as required by Section 332(c)(7)(B)(iii),[141] and the timeframes as proposed may not accommodate reasonable, gener-

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(*citing* to the processing experienced by MetroPCS in Delaware and Pennsylvania); NextG Networks Comments at 9-14 (*citing* to North Carolina, Florida & Kentucky statutes).

[138] City of Saint Paul, Minnesota and the City's Board of Water Commissioners Comments at 10.

[139] City of LaGrande, Oregon Comments at 3.

[140] Such collaborative processes are asserted to have led to improved antenna deployments. *See, e.g.*, California Cities Comments at 13-16.

[141] Michigan Municipalities Comments at 14-19.

ally applicable procedural requirements in some communities.[142] Although, as noted above, the reviewing court will have the opportunity to consider such unique circumstances in individual cases, it is important for purposes of certainty and orderly processing that the timeframes for determining when suit may be brought in fact accommodate reasonable processes in most instances.[143]

45. Based on our review of the record as a whole, we find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day

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[142] *See, e.g.*, Fairfax County, VA Comments at 7-10; City of Dublin, OH Comments at 3-4; Florida Cities Comments at 8-9.

[143] California Cities note that the Commission previously rejected time limits for itself in a rulemaking concerning petitions filed pursuant to Section 332(c)(7)(B)(v) because they would not afford the Commission sufficient flexibility to account for particular facts in a case. California Cities Comments at 8-10 (*citing* Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Docket No. 97-192, *Report and Order*, 15 FCC Rcd 22821, 22829-30 ¶ 20 (2000)). The timeframes that we adopt account for the flexibility that may be needed to address different fact situations, while at the same time adhering to the important public interest in certainty discussed above.

timeframes are sufficient for State and local governments to process applications.[144]

46. We find that collocation applications can reasonably be processed within 90 days. Collocation applications are easier to process than other types of applications as they do not implicate the effects upon the community that may result from new construction. In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community. Therefore, many jurisdictions do not require public notice or hearings for collocations.[145] For purposes of this standard, an application is a request for collocation if it does not involve a "substantial increase in the size of a tower" as defined in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas.[146] This limitation will

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[144] U.S. Cellular Reply Comments at 2-3.

[145] *See, e.g.*, N.C. Gen. Stat. Ann. § 153A-349.53(a); Fla. Stat. Ann. § 365.172(12)(a)(1)(a).

[146] *See* T-Mobile Comments at 10-11. A "[s]ubstantial increase in the size of the tower" occurs if:

(1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or (2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) [t]he

help to ensure that State and local governments will have a reasonable period of time to review those applications that may require more extensive consideration.

47. Several State statutes already require application processing within 90 days. California and Minnesota require both collocation and non-collocation applications to be processed within 60 days.[147] North Carolina has a time period of 45 days for processing after a 45-day review period for application completeness (for a total of 90 days),[148] and Florida's process is 45 business days after a 20-

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mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

47 C.F.R. Part 1, App. B—Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Definitions, Subsection C.

[147] Cal. Gov't. Code §§ 65950 & 65943 (assuming no environmental review is required; also has 30-day review period for completeness); Minn. Stat. Ann. § 15.99 (permitting an additional 60-day extension upon written notice to applicant).

[148] N.C. Gen. Stat. Ann. § 153A-349.52.

business day review period for application completeness (for a total of approximately 91 days, including weekends).[149] Moreover, the evidence submitted by local governments indicates that most already are processing collocation applications within 90 days. Of the approximately 51 localities that submitted information concerning their processing of collocation applications, only eight state that their processing is longer than 90 days. However, five of those localities indicate that their processing is within 120 days, on average. Based on these facts, we conclude that a 90-day timeframe for processing collocation applications is reasonable.

48. We further find that the record shows that a 150-day processing period for applications other than collocations is a reasonable standard that is consistent with most statutes and local processes. First, of the eight State statutes discussed in the record that cover non-collocation applications, only one State, Connecticut, contemplates a longer process.[150] Nonetheless, the process in Connecticut is only 30 days longer than the timeframe set forth here.[151]

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[149] Fla. Stat. Ann. § 365.172. In addition, the State of Connecticut's Connecticut Siting Council states that "most applications to approve a tower-sharing request are processed by our agency in four to six weeks." State of Connecticut's Connecticut Siting Council Sept. 24, 2008 Letter at 2.

[150] *See* Conn. Gen. Stat. Ann. §§ 16-50(i) & (p) (action required within 180 days after application is filed).

[151] Moreover, the State of Connecticut, Connecticut Siting Council states that "applications to approve a new-build tower are generally reviewed and acted upon in four to five months." State of Connecticut's Connecticut Siting Council Sept. 24,

The other seven States provide for a review period of 60 to 150 days.[152] Second, of the processes described by local governments in the record, most already routinely conclude within 150 days or less. Approximately 51 localities submitted information concerning their processing of personal wireless service facility siting applications. Of those, only twelve indicate that they may take longer than 150 days. However, four of these twelve cities indicate that they generally process the applications within 180 days. Based on these facts, we conclude that a 150-day timeframe for processing applications other than collocations is reasonable. Accordingly, we do not agree that the Commission's imposition of the 90-day

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2008 Letter at 2.

[152] The State of California requires applications to be processed within 60 days, after a 30-day review period for completeness, assuming no environmental review is required. Cal. Gov't. Code §§ 65950 & 65943. The State of Florida requires applications to be processed within 90 business days, after a 20-business day review period for completeness. Fla. Stat. Ann. § 365.172. The State of Minnesota requires applications to be processed within 60 days, which can be extended an additional 60 days upon written notice to the applicant. Minn. Stat. Ann. § 15.99. The State of Oregon requires applications to be processed within 120 days, after a 30-day review period for completeness. Or. Rev. Stat. § 227.178. The Commonwealth of Virginia requires applications to be processed within 90 days, which can be extended an additional 60 days. Va. Code Ann. § 15.2-2232. The State of Washington requires applications to be processed within 120 days, after a 28-day review period for completeness. Wash. Rev. Code §§ 36.70B.080 & 36.70B.070. The State of Kentucky requires applications to be processed within 60 days. Ky. Rev. Stat. Ann. § 100.987.

and 150-day timeframes will disrupt many of the processes State and local governments already have in place for personal wireless service facility siting applications.[153]

49. Related Issues. Section 332(c)(7)(B)(v) provides that an action for judicial relief must be brought "within 30 days" after a State or local government action or failure to act.[154] Thus, if a failure to act occurs 90 days (for a collocation) or 150 days (in other cases) after an application is filed, any court action must be brought by day 120 or 180 on penalty of losing the ability to sue. We conclude that a rigid application of this cutoff to cases where the parties are working cooperatively toward a consensual resolution would be contrary to both the public interest and Congressional intent. Accordingly, we clarify that a "reasonable period of time" may be extended beyond 90 or 150 days by mutual consent of the personal wireless service provider and the State or local government, and that in such instances, the commencement of the 30-day period for filing suit will be tolled.

50. To the extent existing State statutes or local ordinances set different review periods than we do here, we clarify that our interpretation of Section 332(c)(7) is independent of the operation of these statutes or ordinances. Thus, where the review pe-

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[153] *See, e.g.*, California Cities Comments at 10-12; Fairfax County, VA Comments at 7-10; City of Dublin, OH Comments at 3-4; Michigan Municipalities Comments at 11-14.

[154] 47 U.S.C. § 332(c)(7)(B)(v).

riod in a State statute or local ordinance is shorter than the 90-day or 150-day period, the applicant may pursue any remedies granted under the State or local regulation when the applicable State or local review period has lapsed. However, the applicant must wait until the 90-day or 150-day review period has expired to bring suit for a "failure to act" under Section 332(c)(7)(B)(v). Conversely, if the review period in the State statute or local ordinance is longer than the 90-day or 150-day review period, the applicant may bring suit under Section 332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired. Of course, the option is also available in these cases to toll the period under Section 332(c)(7) by mutual consent.

51. We further conclude that given the ambiguity that has prevailed until now as to when a failure to act occurs, it is reasonable to give State and local governments an additional period to review currently pending applications before an applicant may file suit. Accordingly, as a general rule, for currently pending applications we deem that a "failure to act" will occur 90 days (for collocations) or 150 days (for other applications) after the release of this Declaratory Ruling. We recognize, however, that some applications have been pending for a very long period, and that delaying resolution for an additional 90 or 150 days may impose an undue burden on the applicant. Therefore, a party whose application has been pending for the applicable timeframe that we

establish herein or longer as of the release date of this Declaratory Ruling may, after providing notice to the relevant State or local government, file suit under Section 332(c)(7)(B)(v) if the State or local government fails to act within 60 days from the date of such notice. The notice provided to the State or local government shall include a copy of this Declaratory Ruling. This option does not apply to applications that have currently been pending for less than 90 or 150 days, and in these instances the State or local government will have 90 or 150 days from the release of this Declaratory Ruling before it will be considered to have failed to act. We find that this transitional regime best balances the interests of applicants in finality with the needs of State and local governments for adequate time to implement our interpretation of Section 332(c)(7).

52. Finally, certain State and local government commenters argue that the timeframes should take into account that not all applications are complete as filed and that applicants do not always file necessary additional information in a timely manner.[155] MetroPCS does not contest this argument, but it further proposes that local authorities should be required to notify applicants of incomplete applications within three business days and to inform the

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[155] *See, e.g.*, Fairfax County, VA Comments at 13; City of Bellingham, WA Comments at 1-2; Michigan Municipalities Comments at 19-20; Stokes County, N.C. Comments at 1 (complete application should be required); Florida Cities Comments at 8-9 (wireless companies should also be held to timelines for responding to requests from localities concerning siting applications).

applicant what additional information should be submitted.[156] The Petitioner supports MetroPCS's proposal.[157] We concur that the timeframes should take into account whether applications are complete. Accordingly, we find that when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information. We also find that reviewing authorities should be bound to notify applicants within a reasonable period of time that their applications are incomplete. It is important that State and local governments obtain complete applications in a timely manner, and our finding here will provide the incentive for wireless providers to file complete applications in a timely fashion.

53. Five State statutes discussed in the record specify a period for a review of the applications for completeness. The State of Florida requires an application to be reviewed within 20 business days for determining whether it is complete;[158] the State of Washington requires review within 28 days;[159] the

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[156] MetroPCS Comments at 12. MetroPCS also proposes that the zoning authority should be conclusively deemed to have accepted the filing as complete if it does not respond within three days.

[157] CTIA Reply Comments at 18.

[158] *See* Fla. Stat. Ann. § 365.172 (providing for a 20-business day review for application completeness, then a 45- business day period for collocation application processing and a 90-business day period for all other application processing).

[159] Wash. Rev. Code §§ 36.70B.080 & 36.70B.070 (providing for

States of California and Oregon require review within 30 days;[160] and the State of North Carolina requires review within 45 days.[161] Considering this evidence as a whole, a review period of 30 days gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete. Accordingly, we conclude that the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days only if that State or local government notifies the applicant within the first 30 days that its application is incomplete. We find that the total amount of time, including the review period for application completeness, is generally consistent with those States that specifically include such a review period.

C. Prohibition of Service by a Single Provider

54. *Background.* The Petitioner next asks the Commission to conclude that State or local regu-

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a 28-day review for application completeness, then a 120-day period for application processing).

[160] Cal. Gov't. Code §§ 65943 & 65950 (providing for a 30-day review for application completeness, then a 60-day period for application processing assuming there are no environmental issues); Or. Rev. Stat. § 227.178 (providing for a 30-day review for application completeness, then a 120-day period for application processing).

[161] N.C. Gen. Stat. Ann. § 153A-349.52 (providing for a 45-day review for application completeness, then a 45-day period for collocation application processing).

lation that effectively prohibits one carrier from providing service because service is available from one or more other carriers violates Section 332(c)(7)(B)(i)(II) of the Act.[162] The Petitioner contends that the Act does not define what constitutes a prohibition of service for purposes of Section 332(c)(7)(B)(i)(II).[163] The Petitioner asserts that Circuit court decisions have interpreted this provision in a number of different ways, including so as to allow the denial of an application so long as a single wireless provider serves the area, thereby creating a need for the Commission to interpret it.[164] The Petitioner argues that its position is consistent with the pro-competitive goals of the 1996 Telecommunications Act, and further, that the provision refers to personal wireless services in the plural, which cuts against a single provider interpretation.[165] Similarly, Section 332(c)(7)(B)(i)(I) bars unreasonable discrimination among providers, also suggesting a preference for multiple providers.[166] In addition to supporting the Petitioner's argument, numerous wireless providers assert that if local zoning authorities could deny siting applications whenever another carrier serves the area, competition as intended by the 1996 Act and the introduction of new technolo-

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[162] Petition at 30-35.

[163] *Id.* at 30.

[164] *Id.* at 31.

[165] *Id.* at 31-32.

[166] *Id.* at 32.

gies would be impeded, and E911 service and public safety could be impacted.[167]

55. Parties opposing the Petition argue that if, as the Petition suggests, there are local governments that deny applications solely because of coverage by another provider, the affected provider can, as courts have recognized, bring a claim of unreasonable discrimination.[168] Opponents also argue that the Petition fails to provide any credible or probative evidence of a prohibition on the ability of any provider to provide services.[169] Commenters also argue that granting the Petition would limit State and local authorities' ability to regulate the location of facilities.[170] One opposition commenter suggests that because the interpretation advanced in the Petition would appear to prevent localities from considering the presence of service by other carriers in evaluating an additional carrier's application for an antenna site, granting this request could have a negative impact on airports by increasing the number of potential obstructions to air navigation.[171] Finally, one commenter argues that because Section

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[167] *See, e.g.*, Sprint Nextel Comments at 11-12; T-Mobile Comments at 13-14; NextG Networks Comments at 14-15.

[168] *See* NATOA et al. Comments at 20.

[169] *Id.* at 22.

[170] *See, e.g.*, City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

[171] *See* North Carolina Department of Transportation's Division of Aviation Comments at 2.

332(c)(7)(A)[172] states that the zoning authority of a State or local government over personal wireless service facilities is only limited by the specific exceptions provided in Section 332(c)(7)(B), and because Section 332(c)(7)(B) does not say that a zoning authority cannot consider the presence of other providers, the Commission may not impose such a limitation.[173]

56. *Discussion.* We conclude that a State or local government that denies an application for personal wireless service facilities siting solely because "one or more carriers serve a given geographic market"[174] has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services," within the meaning of Section 332(c)(7)(B)(i)(II). Initially, we note that courts of appeals disagree on whether a State or local policy that denies personal wireless service facility siting applications solely because of the presence of another carrier should be treated as a siting regulation that prohibits or has the effect of prohibiting such services.[175] Thus, a controversy exists that is

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[172] 47 U.S.C. § 332(c)(7)(A) (stating "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.").

[173] *See* County of Albemarle, VA Comments at 8-9.

[174] Petition at 32.

[175] Some courts of appeals have found no violation of the "effect of prohibiting" clause solely because another carrier is providing service. *See APT Pittsburgh L.P. v. Penn Township*

appropriately resolved by declaratory ruling.[176] We agree with the Petitioner that the fact that another carrier or carriers provide service to an area is an inadequate defense under a claim that a prohibition exists, and we conclude that any other interpretation of this provision would be inconsistent with the Telecommunications Act's pro-competitive purpose.

57. Section 332(c)(7)(B)(i)(II) provides, as a limitation on the statute's preservation of local zon-

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Butler County of Pa., 196 F.3d 469, 480 (3d Cir. 1999) ("evidence that the area the new facility will serve is not already served by another provider" essential to showing violation "effect of prohibiting" clause); *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998) (concluding that the statute only applies when the State or local authority has adopted a blanket ban on wireless service facilities). Other courts of appeals have reached the opposite conclusion. *See Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 633-34 (1st Cir. 2002) (rejecting a rule that "any service equals no effective prohibition"); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 731-33 (9th Cir. 2005) (adopting the First Circuit's analysis).

[176] *See* 47 C.F.R. § 1.2; *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. at 2700 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion"). None of the courts of appeals has held that the meaning of Section 332(c)(7)(B)(i)(II) is unambiguous. *See, e.g., Omnipoint Holdings, Inc., v. City of Cranston*, No. 08-2491 (1st Cir. November 3, 2009) ("Beyond the statute's language, the [Communications Act] provides no guidance on what constitutes an effective prohibition, so courts ... have added judicial gloss").

ing authority, that a State or local government regulation of personal wireless facilities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[177] While we acknowledge that this provision could be interpreted in the manner endorsed by several courts – as a safeguard against a complete ban on all personal wireless service within the State or local jurisdiction, which would have no further effect if a single provider is permitted to provide its service within the jurisdiction – we conclude that under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants.

58. We reach this conclusion for several reasons. First, our interpretation is consistent with the statutory language referring to the prohibition of "the provision of personal wireless *services*" rather than the singular term "service." As the First Circuit observed, "[a] straightforward reading is that 'services' refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers." [178]

59. Second, an interpretation that would regard the entry of one carrier into the locality as mooting a subsequent examination of whether the locality has improperly blocked personal wireless services ignores the possibility that the first carrier

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[177] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[178] Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d at 634.

may not provide service to the entire locality, and a zoning approach that subsequently prohibits or effectively prohibits additional carriers therefore may leave segments of the population unserved or underserved.[179] In the words of the First Circuit, the "fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers."[180] Such action on the part of the locality would contradict the clear intent of the statute.

60. Third, we find unavailing the reasons cited by the Fourth Circuit (and some other courts) to support the interpretation that the statute only limits localities from prohibiting all personal wireless services (*i.e.*, a blanket ban or "one-provider" approach). The Fourth Circuit's principal concern was that giving each carrier an individualized right under Section 332(c)(7)(B)(i)(II) to contest an adverse zoning decision as an unlawful prohibition of its

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[179] To the extent a wireless carrier has gaps in its service, a zoning restriction that bars additional carriers will cement those gaps in place and effectively prohibit any consumer from receiving service in those areas. If the gap is large enough, the people living in the gap area who tend to travel only shorter distances from home will be left without a usable service altogether. According to the First Circuit, the presence of the one carrier in the jurisdiction therefore does not end the inquiry under Section 332(c)(7)(B): "That one carrier provides some service in a geographic gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers." *Second Generation Properties, L.P v. Town of Pelham*. 313 F.3d at 634.

[180] *Id.*

service "would effectively nullify local authority by mandating approval of all (or nearly all) applications."[181] As explained below, however, our interpretation of the statute does not mandate such approval and therefore does not strip State and local authorities of their Section 332(c)(7) zoning rights. Rather, we construe the statute to bar State and local authorities from prohibiting the provision of services of individual carriers solely on the basis of the presence of another carrier in the jurisdiction; State and local authority to base zoning regulation on other grounds is left intact by this ruling.

61. Finally, our construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act. In promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers. Our interpretation in this Declaratory Ruling promotes these statutory objectives more effectively than the alternative, which could perpetuate significant coverage gaps within any individual wireless provider's service area and, in turn, diminish the service provided to their customers.[182]

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[181] *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d at 428.

[182] *See MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 732 (result of "one-provider" interpretation is "a crazy patchwork quilt of intermittent coverage ... [that] might have the effect of driving the industry toward a single carrier," *quoting Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631).

In addition, under the Fourth Circuit's approach, competing providers may find themselves barred from entering markets to which they would have access under our interpretation of the statute, thus depriving consumers of the competitive benefits the Act seeks to foster. As the First Circuit recently stated, the "one-provider rule" "prevents customers in an area from having a choice of reliable carriers and thus undermines the [Act's] goal to improve wireless service for customers through industry competition."[183] In sum, our rejection of this rule "actually better serves both individual consumers and the policy goals of the [Communications Act]."[184]

62. Our determination also serves the Act's goal of preserving the State and local authorities' ability to reasonably regulate the location of facilities in a manner that operates in harmony with federal policies that promote competition among wireless providers.[185] As we indicated above, nothing we do here interferes with these authorities' consideration of and action on the issues that traditionally inform local zoning regulation. Thus, where a *bona fide* local zoning concern, rather than the mere presence of other carriers, drives a zoning decision, it should be unaffected by our ruling today. The Peti-

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[183] *Omnipoint Holdings, Inc., v. City of Cranston (citing Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631, 633).

[184] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 722.

[185] *See, e.g.*, City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

tioner appears to recognize this when it states that it "does not seek a ruling that zoning authorities are prohibited from favoring collocation over new facilities where collocation is appropriate."[186] Our ruling here does not create such a prohibition. To the contrary, we would observe that a decision to deny a personal wireless service facility siting application that is based on the availability of adequate collocation opportunities is not one based solely on the presence of other carriers, and so is unaffected by our interpretation of the statute in this Declaratory Ruling.

63. We disagree with the assertion that granting the petition could have a negative impact on airports by increasing the number of potential obstructions to air navigation.[187] As the Federal Aviation Administration notes, our action on this Petition does not alter or amend the Federal Aviation Administration's regulatory requirements and process.[188] Under the Commission's rules as well, parties are required to submit for Federal Aviation Administration review all antenna structures[189] that potentially can endanger air navigation, including those

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[186] CTIA Reply Comments at 29-30 (emphasis removed).

[187] *See* North Carolina Department of Transportation's Division of Aviation Comments at 2.

[188] *See* FAA Comments at 1.

[189] Section 17.2(a) of the rules defines "antenna structure" as including "the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a).

near airports.[190] The Commission requires antenna structures that exceed 200 feet in height above ground or which require special aeronautical study to be painted and lighted[191] and also requires antenna structures to conform to the Federal Aviation Administration's painting and lighting recommendations.[192]

64. We reject the assertion that the declaration the Petitioner seeks would violate Section 332(c)(7)(A).[193] Subparagraph (A) states that the authority of a State or local government over decisions regarding the placement, construction, and modification of personal wireless service facilities is limited only by the limitations imposed in subparagraph (B).[194] Because the Petition requests that the Commission clarify one of the express limitations of Section 332(c)(7)(B) – *i.e.*, whether reliance solely on the presence of other carriers effectively operates as a prohibition under Section 332(c)(7)(B)(i)(II) – we find that the Petitioner is not seeking an additional limitation beyond those enumerated in subparagraph (B).

65. In addition, opponents argue that denial of a single application is insufficient to demonstrate a violation of the "effect of prohibiting"

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[190] *See* 47 C.F.R. § 17.7.

[191] *See* 47 C.F.R. § 17.21.

[192] *See* 47 C.F.R. § 17.23.

[193] *See* County of Albemarle, Virginia Comments at 8-9.

[194] 47 U.S.C. § 332(c)(7)(A).

clause.[195] Circuit courts have generally been hesitant to find that denial of a single application demonstrates such a violation, but to varying degrees, they allow for that possibility.[196] We note that the denial of an application may sometimes establish a violation of Section 332(c)(7)(B)(ii) if it demonstrates a policy that has the effect of prohibiting the provision of personal wireless services as interpreted herein. Whether the denial of a single application indicates the presence of such a policy will be dependent on the facts of the particular case.

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[195] *See* NATOA et al. Comments at 19-20; Coalition for Local Zoning Authority Comments at 11.

[196] *See, e.g., Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999) ("Obviously, an individual denial is not automatically a forbidden prohibition violating the [effect of prohibiting clause]."); *APT Pittsburgh L.P. v. Penn Township Butler County of Pa.*, 196 F.3d at 478-79 ("Interpreting the [Telecommunications Act's] 'effect of prohibiting' clause to encompass every individual zoning denial simply because it has the effect of precluding a specific provider from providing wireless services, however, would give the [Act] preemptive effect well beyond what Congress intended. . . . This does not mean, however, that a provider can never establish that an individual adverse zoning decision has the 'effect' of violating [Section] 332(c)(7)(B)(i)(II)."); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 731 ("it would be extremely dubious to infer a general ban from a single [] denial"). *See also T-Mobile, USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994-95 (9th Cir. 2009) (finding that because the city was unable to show that there were any available and feasible alternatives to T-Mobile's proposed site, the City's denial of T-Mobile's application constituted a violation of the effect of prohibiting clause under Section 332(c)(7)(B)(i)(II)).

D. Ordinances Requiring Variances

66. *Background.* In its Petition, CTIA requests that the Commission preempt, under Section 253(a) of the Act,[197] local ordinances and State laws that effectively require a wireless service provider to obtain a variance, regardless of the type and location of the proposal, before siting facilities.[198] It asks the Commission to declare that any ordinance automatically imposing such a condition is "an impermissible barrier to entry under Section 253(a)" and is therefore preempted.[199] To support such action, CTIA provides two examples of zoning limitations in a "New Hampshire community" and a "Vermont community" that it claims in effect require carriers to obtain a special variance.[200] Wireless providers that address this issue agree with the Petition, arguing that the variance process sets a high evidentiary bar which diminishes the wireless providers' prospects of gaining approval to site facilities.[201] Many other commenting parties are opposed to the Petition's request and assert, for example, that Section 332(c)(7) is the exclusive authority in the Act on matters in-

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[197] 47 U.S.C. § 253(a).

[198] *See* Petition at 35-37.

[199] *Id.* at 37; *see also id.* at 36 ("The FCC should declare that any ordinance that automatically requires a . . . variance . . . is preempted. . . ").

[200] *See id.* at 36.

[201] *See, e.g.*, Sprint Nextel Comments at 13-14; CalWA Comments at 3; Rural Cellular Association Comments at 8; MetroPCS Comments at 13.

volving wireless facility siting.[202] They maintain that Section 253 does not apply to wireless facility siting disputes involving blanket variance ordinances.[203]

67. *Discussion.* We deny CTIA's request for preemption of ordinances that impose blanket variance requirements on the siting of wireless facilities. Because CTIA does not seek actual preemption of any ordinance by its Petition,[204] we decline to issue a declaratory ruling that "zoning ordinances requiring variances for all wireless siting requests are unlawful and will be struck down if challenged in the context of a Section 253 preemption action."[205] CTIA does not present us with sufficient information or evidence of a specific controversy on which to base such action or ruling,[206] and we conclude that any

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[202] 47 U.S.C. § 332(c)(7).

[203] Several commenters argue that by using the sweeping phrase "nothing in this chapter," Congress made clear that it intended Section 332(c)(7) to override any other provision in the Communications Act that may be in conflict, including Section 253. They further argue that CTIA's proposal to have the Commission broadly preempt any ordinances "effectively" requiring a variance directly conflicts with Congress' preservation of local zoning authority in Section 332(c)(7). *See, e.g.*, NATOA *et al.* Comments at 7; California Cities Comments at 23-24; Fairfax County Comments at 3; Michigan Municipalities Comments at 2; N.C. Assoc. of County Commissioners Comments at 1-2.

[204] *See, e.g.*, CTIA Reply Comments at 33 n.124.

[205] *Id.* at 30.

[206] Although the Petition identifies two examples that Petitioner describes as problematic, it does not represent that

further consideration of blanket variance ordinances should occur within the factual context of specific cases. To the extent specific evidence is presented to the Commission that a blanket variance ordinance is an effective prohibition of service, then we will in that context consider whether to preempt the enforcement of that ordinance in accordance with the statute. We note that in denying CTIA's request, we make no interpretation of whether and how a matter involving a blanket variance ordinance for personal wireless service facility siting would be treated under Section 332(c)(7) and/or Section 253 of the Act.[207]

E. Other Issues

68. *Service Requirements.* Numerous parties argue that the Petitioner failed to follow the Commission's service requirements with respect to preemption petitions.[208] Our rules require that a party filing either a petition for declaratory ruling seeking preemption of State or local regulatory authority, or a petition for relief under Section 332(c)(7)(B)(v), must serve the original petition on any State or local government whose actions are

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the ordinances explicitly require variances for all applications, nor does it attempt to demonstrate with any specificity why the examples effectively require variances in all instances. *See* Petition at 36 (briefly describing ordinances of communities in Vermont and New Hampshire).

[207] 47 U.S.C. §§ 332(c)(7), 253.

[208] *See, e.g.*, Coalition for Local Zoning Authority Comments at 2-4; NATOA et al. Comments at 21; Greater Metro Telecom. Consortium and City of Boulder, CO Comments at 2-3.

cited as a basis for requesting preemption.[209] By its terms, the service requirement does not apply to a petition that cites examples of the practices of unidentified jurisdictions to demonstrate the need for a declaratory ruling interpreting provisions of the Communications Act.[210] Commenters' principal argument is that the Commission should require the Petitioner to identify the jurisdictions that it references anonymously, which, they assert, would then trigger the service requirement. However, nothing in the rules requires that these jurisdictions be identified. We recognize, as commenters emphasize, that in the absence of identification it has not been possible for some local governments to respond to certain factual statements in the Petition, either directly or through their associations,[211] and we take this into account in considering the weight we give to these assertions. At the same time, State and local gov-

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[209] 47 C.F.R. § 1.1206(a), Note 1.

[210] We note that the Petitioner did belatedly serve the two local governments whose ordinances were described in the Petition as requiring variances; however, as discussed above, we deny Petitioner's request to preempt ordinances that require variances. *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Opposition to Motions for Extension of Time*, at 3 n.7 (filed Aug. 26, 2008).

[211] *See, e.g.*, City of Philadelphia Comments at 2-3 (arguing that the failure of the Petitioner to identify and serve the localities discussed in its Petition denies the Commission a complete and fair record of the facts).

ernments have entered voluminous evidence into the record on their own behalf, including responses to several of the specific examples offered by the Petitioner. Accordingly, we conclude that the record is sufficient to address the Petitioner's claims.

69. *Radiofrequency (RF) Emissions.* Several commenters argue that we should deny CTIA's Petition in order to protect local citizens against the health hazards that these commenters attribute to RF emissions.[212] Section 332(c)(7)(B)(iv) of the Act provides that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[213] To the extent commenters argue that State and local governments require flexibility to deny personal wireless service facility siting applications or delay action on such applications based on the perceived health effects of RF emissions, this authority is denied by statute under Section 332(c)(7)(B)(iv). Accordingly, such arguments are outside the scope of this proceeding.

70. In its Comments and Cross-Petition, EMRPI contends that in light of additional data that

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[212] *See, e.g.*, Catherine Kleiber Comments; E. Stanton Maxey Comments at 1; Maria S. Sanchez Comments at 1-2; Miranda R. Taylor Comments at 1-2.

[213] 47 U.S.C. § 332(c)(7)(B)(iv).

has been compiled since 1996, the RF safety regulations that the Commission adopted at that time are no longer adequate.[214] EMRPI is asking us to revisit the Commission's previous decision that the scientific evidence did not support the establishment of guidelines to address the non-thermal effects of RF emissions.[215] This request is also outside the scope of the current proceeding, and we therefore dismiss EMRPI's Cross-Petition.

IV. CONCLUSION

71. For the reasons discussed above, we grant in part and deny in part CTIA's Petition for a Declaratory Ruling interpreting provisions of Section 332(c)(7) of the Communications Act. In particular, we find that a "reasonable period of time" for a State or local government to act on a personal wireless service facility siting application is presumptively 90 days for collocation applications and presumptively 150 days for siting applications other than collocations, and that the lack of a decision within these timeframes constitutes a "failure to act" based on which a service provider may commence an action in court under Section 332(c)(7)(B)(v). We also find that where a State or local government denies a per-

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[214] EMRPI Comments and Cross-Petition at 4.

[215] Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, *Second Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 13494, 13505 ¶ 31 (1997), *aff'd sub nom. Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), *cert. denied sub nom. Citizens for the Appropriate Placement of Telecommunications Facilities v. FCC*, 531 U.S. 1070 (2001).

sonal wireless service facility siting application solely because that service is available from another provider, such a denial violates Section 332(c)(7)(B)(i)(II). By clarifying the statute in this manner, we recognize Congress' dual interests in promoting the rapid and ubiquitous deployment of advanced, innovative, and competitive services, and in preserving the substantial area of authority that Congress reserved to State and local governments to ensure that personal wireless service facility siting occurs in a manner consistent with each community's values.

V. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201(b), 253(a), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201(b), 253(a), 303(r), 332(c)(7), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling filed by CTIA—The Wireless Association IS GRANTED to the extent specified in this Declaratory Ruling and otherwise IS DENIED.

73. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 332(c)(7), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Cross-Petition filed by the EMR Policy Institute IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Participants in Proceeding

Comments

AT&T Inc. (AT&T)
Air Line Pilots Association, International
Aircraft Owners and Pilots Association
Airports Council International-North America
Alltel Communications, LLC
American Legislative Exchange Council
American Planning Association
Arthur Firstenberg
Atlantic Technology Consultants, Inc.
Aviation Council of Alabama Inc.
Aviation Department, Charles B. Wheeler Downtown Airport
B. Blake Levitt
Bartonville, Texas
Broadcast Signal Lab, LLC
Cable and Telecommunications Committee of the New Orleans City Council
California Wireless Association (CalWA)
Carole Maurer and John Dilworth
Cascade Charter Township, Michigan
Catawba County
Catherine Kleiber
Charles B. Wheeler Downtown Airport
Charleston County Planning Department, Charleston County, South Carolina
Citizens Against Government Waste
City of Airway Heights, Washington State
City of Albany, California
City of Albuquerque, New Mexico

City of Anacortes, Washington
City of Apple Valley, Dakota County Minnesota
City of Arlington, Texas
City of Auburn, Washington (City of Auburn, WA)
City of Austin, Texas
City of Bartonville, Texas
City of Bellevue, Washington
City of Bellingham, Washington (City of Bellingham, WA)
City of Bloomington Minnesota
City of Boca Raton
City of Burien, Washington (City of Burien, WA)
City of Champaign, Illinois
City of Cincinnati, Ohio
City of Columbia, South Carolina
City of Coppell, Texas
City of Dallas, Texas
City of Des Plaines, Illinois
City of Dublin, Ohio (City of Dublin, OH)
City of Dubuque
City of Evanston, Illinois
City of Farmers Branch
City of Gahanna, Ohio
City of Golf Shores
City of Grand Rapids
City of Greensboro, North Carolina
City of Grove City, Ohio (City of Grove City, OH)
City of Gulf Shores, Alabama
City of Hammond, Michigan

City of Henderson, Nevada
City of Houston, Texas
City of Huntsville, Alabama
City of Kasson, Minnesota
City of Kirkland, Washington
City of Lancaster, Texas
City of LaGrande, Oregon
City of Las Vegas, Nevada
City of Longmont, Colorado
City of Lucas, Texas
City of New Ulm, Minnesota
City of North Oaks
City of North Ridgeville, Ohio
City of Oak Park Heights
City of Philadelphia
City of Plymouth, Minnesota
City of Prior Lake, Minnesota
City of Red Wing
City of Richardson Texas
City of Rowlett Texas
City of Saint Paul, Minnesota and the City's Board of Water Commissioners
City of San Antonio, Texas
City of Scottsdale
City of SeaTac, Washington (City of SeaTac, WA)
City of Sebastopol
City of Tyler
City of Walker, Michigan
City of Wichita and Sedgwick County, Kansas
Clear Creek County, Colorado

Coalition for Local Zoning Authority City of Los Angeles, et al. (Coalition for Local Zoning Authority)
Connecticut Siting Council, State of Connecticut
County of Albemarle, Virginia
County of Frederick, Virginia
County of Goochland & Office of the County Attorney
County of Sonoma (Sonoma County, CA)
Craven County Board of Commissioners
CTIA - The Wireless Association (Petitioner)
Domagoj Vucic
Donna G. Haldane
DuPage Mayors and Managers Conference
Elizabeth Kelley
Evelyn Savarin
FCC Intergovernmental Advisory Committee
Fairfax County, VA
Federal Aviation Administration (FAA)
Florida Airports Council
Florida Department of Transportation
GMTC-RCC
George Heartwell, Mayor of City of Grand Rapids, Michigan
Glenda Cassutt
Goochland County, Virginia
Grand County, Colorado
Gray Robinson, P.A.
Greater Metro Telecommunications Consortium, et al.
Incorporated Village of Laurel Hollow
Iredell County, North Carolina

Jill Koontz
Kimberly Kitano
La Grande, Oregon
League of Minnesota Cities
League of Oregon Cities
Lee County Port Authority
Louisville Regional Airport Authority
Maria S. Sanchez
Marilyn Stollon
Marjorie Lundquist
MetroPCS Communications, Inc. (MetroPCS)
Michael C. Seamands
Michigan Municipalities and Other Concerned Communities (Michigan Municipalities)
Miranda Taylor
Miriam Dyak
Missouri State Aviation Council
National Agricultural Aviation Association
National Association of Counties (NACo)
National Association of State Aviation Officials
National Association of Telecommunications Officers and Advisors, National League of Cities, and United States Conference of Mayors (NATOA et al.)
National Emergency Number Association (NENA)
NextG Networks, Inc. (NextG Networks)
North Carolina Association of County Commissioners (N.C. Assoc. of County Commissioners)
North Carolina Chapter of the American Planning Association

North Carolina Department of Transportation's Division of Aviation
North Carolina League of Municipalities
Northwest Municipal Conference
NYC Council Member Tony Avella, Chair, Zoning and Franchises Subcommittee
Olemara Peters
Olmsted County Board of Commissioners
Palm Beach County Planning, Zoning & Building Department
PCIA—The Wireless Infrastructure Association and The DAS Forum
Piedmont Environmental Council, Citizens for Fauquier County, Shenandoah
Valley Network, and Appalachian Trail Conservancy
Pima County, Arizona
Prince William County, Virginia
Robeson County, North Carolina
Rural Cellular Association
SCAN NATOA, Inc. (SCAN NATOA)
San Francisco Neighborhood Antenna-Free Union
Sandi Maurer
Sanford Airport Authority
Soledad M. de Pinillos
Sprint Nextel Corporation (Sprint Nextel)
State of Connecticut
Stokes County, North Carolina (Stokes County, N.C.)
Susan Izzo
Texas Municipal League
The Colony, Texas

The EMR Network
The EMR Policy Institute (EMRPI)
The League of California Cities, the California State Association of Counties, and the City and County of San Francisco (California Cities)
The University of Michigan (University of Michigan)
T-Mobile USA, Inc. (T-Mobile)
Town of Alton, New Hampshire
Town of Apex, North Carolina
Town of Cary, North Carolina
Town of Gilbert, Arizona
Town of Grand Lake, Colorado
Town of Matthews, North Carolina
Town of Trent Woods
United States Cellular Corporation (U.S. Cellular)
Varnum, Riddering, Schmidt & Howlett, LLP
Verizon Wireless
Victoria Jewett
Village of Bay Harbor, Town of Bay Harbor Islands, Town of Cutler Bay, City of Hollywood, City of Homestead, City of Miramar, City of Sunrise, City of Weston (Florida Cities)
Village of Alden, New York (Village of Alden, NY)
Village of Buffalo Grove
Village of East Hills, New York
Village of Hoffman Estates
Village of Morton Grove
Village of Mount Prospect, Illinois

Village of New Albany, Ohio
Village of Roslyn Estates (Nassau County, New York)
Village of Round Lake
Village of Skokie
Wake County (North Carolina) Planning Department
West Sayville Civic Association
Wichita-Sedgwick County Metropolitan Area Planning Department

Reply Comments

American Consumer Institute Center for Citizen Research
Americans for Tax Reform
Cable and Telecommunications Committee of the New Orleans City Council
California Wireless Association (CalWA)
Citizens Against Government Waste
City of Albuquerque, New Mexico
City of Cincinnati - City Planning Department
City of New York
City of Philadelphia
City of San Antonio, Texas
City of San Diego
City of Texas City
Coalition for Local Zoning Authority City of Los Angeles, et al. (Coalition for Local Zoning Authority)
County of Fairfax, Virginia (Fairfax County)
CTIA - The Wireless Association (CTIA Reply)

Greater Metro Telecommunications Consortium, et al.
The League of California Cities, the California State Association of Counties, and the City and County of San Francisco (California Cities)
Montgomery County, Maryland
National Association of Telecommunications Officers and Advisors, National League of Cities, and United States Conference of Mayors (NATOA et al.)
National Association of Towns and Townships
NextG Networks, Inc. (NextG Networks)
Ohio Township Association
PCIA—The Wireless Infrastructure Association and The DAS Forum
Rural Telecommunications Group, Inc.
SCAN NATOA, Inc. (SCAN NATOA)
United States Cellular Corporation (U.S. Cellular)
Wisconsin Towns Association
Verizon Wireless

APPENDIX B

Section 332(c) of the Communications Act of 1934

(7) **Preservation of local zoning authority**

(A) **General authority.** Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) **Limitations.**

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) **Definitions.** For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

STATEMENT OF CHAIRMAN JULIUS GENACHOWSKI

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Wireless communication—mobile—has always been central to the FCC's mission. And mobile has never had greater potential to help address vital priorities—including generating economic growth, spurring job creation, and advancing national purposes like health care, education, energy independence, and public safety. We must ensure that America leads the world in mobile.

Because mobile increasingly means broadband as well as voice, issues involving spectrum policy and wireless deployment will be important elements of our National Broadband Plan, due by February 17th, and we will hear more about that later today. But even as we work on a National Broadband Plan, we can and should move forward with concrete actions to unleash the opportunity of mobile.

To that end, in August the Commission launched inquiries into how best to promote innovation, investment, and competition in the wireless industry, as well as how to protect and empower consumers of wireless and other communications services.

In October, I outlined a Mobile Broadband Agenda that included as a key element removing obstacles to robust and ubiquitous mobile networks.

And with today's Declaratory Ruling, the Commission moves forward on that agenda and takes an important step to cut through red tape and accelerate the deployment of next-generation wireless services.

After years on the distant horizon, 4G networks are ready to move from the drawing board to the marketplace. One major provider has already launched 4G WiMAX service in select markets. Competitors have announced plans to debut LTE networks in major markets around the country beginning next year.

The real winners here will be American consumers and businesses, who will soon be able to experience mobile broadband speeds and capacities that rival what many fixed broadband customers receive at home today. These new wireless networks will change how we communicate and how we engage in commerce. And they hold the promise of improving our quality of life. To take one example offered by the American Telemedicine Association in encouraging us to take the step we take today, next generation wireless networks will allow doctors to start using mobile technology to monitor and treat chronic illnesses like heart disease and to improve doctor-patient communications.

Accelerating the deployment of these new networks is obviously a critical goal for the nation. But there is a lot of work that remains to be done be-

fore we can enjoy their benefits, and it won't be easy. We at the FCC understand the many challenges mobile operators face in turning engineering plans into actual networks of steel towers, antennas, silicon chips, and sophisticated electronics. We understand that sometimes the Commission needs to act, to establish clear rules of the road to reduce uncertainty and delay, spur investment, encourage innovation, and ensure that the benefits of advanced communications are available to all Americans.

Today's ruling is one example of creating such rules. One challenge mobile operators face is getting timely zoning approvals from state and local officials before building towers or deploying new equipment. Recognizing this problem, Congress required these entities to act on such requests "within a reasonable period of time." Yet, despite Congress's strong statement, the record before us indicates that delays have continued to persist in too many states and localities.

For example, at the time the petition was filed, of the 3,300 pending zoning applications for wireless facilities, over 760 had been pending for more than a year and 180 had been pending for more than three years. There is evidence that in certain jurisdictions the tower siting process is getting longer, even as the need for more towers and for timely decisions is growing.

Today's Declaratory Ruling will help end these unnecessary delays and speed the deployment of 4G networks, while also respecting the legitimate

concerns of local authorities and preserving their control over local zoning and land use policies.

Our decision achieves this balance by defining reasonable and achievable timeframes for state and local governments to act on zoning applications—90 days for collocations and 150 days for other siting applications. I want to be clear that the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use. It simply requires that they must reach land use decisions that involve wireless equipment in a timely fashion and be able to justify their conclusions to a federal district court if challenged, just as Congress specified.

I should note that we reach today's Ruling in response to a petition brought by CTIA, the wireless industry's trade association, and I would like to acknowledge CTIA's role in bringing this important issue to the Commission's attention. The decision we reach today does not grant the full relief that the industry's petition seeks—for example, the petition argued for a shorter set of deadlines, and a requirement that zoning applications be "deemed granted" as soon as the deadlines expired. I believe that the timeframes we adopt today, and the requirement that parties seek injunctive relief from a court, are more consistent with preserving State and local sovereignty and with the intent of Congress.

Nevertheless, I believe the rules we adopt today are amply sufficient to the task and will have an important effect in speeding up wireless carriers'

ability to build new 4G networks—which will in turn expand and improve the range of wireless choices available to American consumers. Of course, we won't rely just on a belief that our rules are having the effects we intend. We will continue to monitor this area closely and ensure that the zoning process with respect to tower siting is operating in the way Congress intended.

I would also like to thank the many able representatives of state and local governments who have worked with my office and the Wireless Bureau to ensure that today's ruling respects the legitimate needs and prerogatives of local land use authorities.

And of course special thanks to Ruth Milkman and her hardworking staff in the Wireless Bureau for their excellent work on this item, and for striving to strike a smart and effective balance between the deployment and expansion of wireless networks and preserving state and local zoning authority.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Today's action makes a further down-payment on the objectives of the National Broadband Plan to ensure that all Americans have access to Twenty-first century communications. Wireless service is clearly going to play—is already playing—a huge role in delivering broadband to rural areas—with the capability of offering connectivity where none exists today and mind-boggling new services to consumers as networks are upgraded. Building wireless broadband infrastructure—and building it expeditiously—is integral to our nation's success in too many ways to recount here this morning. Nor do we have to go beyond the obvious in pointing out how urgent it is to have tower infrastructure in place to support all this.

Building new wireless towers and attaching additional antennae to existing towers generally require—and rightly so—State and local zoning approval. State and local governments are the ones best positioned to take into account the legitimate interests of citizens in their communities in often-complex zoning decisions. Congress, in enacting Section 332 of the Communications Act, preserved this important zoning role that State and local authori-

ties play. At the same time, in order to encourage the expansion of wireless networks nationwide, Congress directed that zoning decisions be made "within a reasonable period of time," allowing court review for failure to act within that timeframe.

In today's decision, we seek to provide greater certainty to both State and local governments, as well as to the wireless industry, as to what constitutes a reasonable period of review for collocation and other tower siting applications. Based on the record and our interpretation of the statute, we clarify the point at which an applicant may seek—should it choose to do so—court review where a State or local zoning authority has not acted. While we establish a presumption here, nothing in this decision reduces the authority of a court of relevant jurisdiction from assessing, based on the merits of any individual case, whether a zoning review of more than 90 days for collocation applications or 150 days for other tower siting applications is reasonable.

I am a great believer in our federal system of government, and have not been shy in the past about opposing Commission action that unnecessarily encroached on the authority of State and local governments. It is for that reason that I strongly dissented from the 2006 *Local Franchising Order*—which I thought went too far in usurping the authority of local franchising authorities without an adequately granular record to justify such action. Additionally, the Commission announced in that previous decision that a cable franchise application pending for more

than a given timeframe was deemed granted. Nothing subtle about that approach!

We take no such actions today. Instead, we actually recognize the rights of State and local jurisdictions and also the importance of the courts. We refrain from dictating final outcomes. But we give an important boost to getting this important infrastructure building job done so that consumers may reap more of the blessings of the great potential of wireless technologies and services. That looks like a win-win-win to me. So I commend the Chairman for getting this important item to us, and I thank all my colleagues, and the Bureau, too, for their hard work and for listening to the concerns of ***all*** parties as we went about crafting today's ruling. It's fair and balanced for real and I am pleased to support it

STATEMENT OF COMMISSIONER ROBERT M. McDOWELL

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

In pursuit of helping to create more choices for consumers, I have long emphasized the importance of removing regulatory roadblocks to ease the ability of new entrants, and existing service providers, to build more delivery platforms for innovative services. For instance, I heartily supported the Commission's work to: free up the TV white spaces for unlicensed use, set shot clocks for local video franchise proceedings, and classify broadband services – no matter the platform – as unregulated Title I information services, to name just a few examples.

Today we are taking yet another positive deregulatory step: We are promoting deployment of broadband, and other emerging wireless services, by reducing the delays associated with the construction and improvement of wireless facilities. I am pleased to support this declaratory ruling, and I thank Chairman Genachowski for his leadership in this area.

Our ruling strikes an elegant balance between establishing a deregulatory national framework to clear unnecessary underbrush, while preserving state and local control over tower siting. In creating deadlines for decisions on wireless siting requests –

90 days for the review of collocation applications and 150 days for the review of other siting applications – we have both granted the industry greater certainty and provided our state and local colleagues reasonable periods for action, as well as the flexibility, to fully consider the nature and scope of a particular siting request. Put another way, our action eliminates unreasonable delay and uncertainty, the costs of which are passed on to wireless consumers, and allows our state and local colleagues the continued ability to safeguard the interests of their constituents. As we fashion a National Broadband Plan for Congress, we should continue to adopt simple initiatives to speed broadband deployment such as this one, which will help spur America's Internet economy, create jobs, and make us more competitive internationally.

On a related point, in recent months, I have heard many in the wireless industry and elsewhere call for "more spectrum." Some have suggested a critical need for many hundreds of megahertz. I fully agree that identifying additional bandwidth for long-term growth is a necessary and worthy endeavor, and I look forward to engaging in that effort. In the meantime, though, I hope that today's action – and the associated reduction in regulatory costs – will also free up capital that may be more effectively used to take better advantage of the immediate fixes already available in the marketplace. These include more robust deployment of enhanced antenna systems; improved development, testing and roll-out of creative technologies, where appropriate, such as cognitive radios; and enhanced consideration of, and

more targeted consumer education on, the use of femto cells. Each of these technological options augments capacity and coverage, which are especially important for data and multimedia transmissions.

In short, the Commission's action today will save the builders of tomorrow's broadband infrastructure time and money. It is my hope that those two crucial resources will be used to squeeze more efficiency out of the airwaves while we undergo the slower process of identifying and bringing more spectrum to market. Accordingly, I eagerly anticipate learning more about the benefits that our decision today has on technological improvements and, ultimately, on consumers.

Thank you to Ruth Milkman and the talented Wireless Telecommunications Bureau staff. Also, many thanks to Austin Schlick and his team in OGC for strengthening the legal arguments underpinning this ruling. We especially appreciate the close coordination among your teams and the 8th floor offices on this draft. Today is a win-win due in no small part to your efforts.

STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

One of the challenges we sometimes face at the Commission is harmonizing federal and local interests. Having recently arrived at the FCC from a state commission, I understand both sides of this occasionally unavoidable tension. In my experience, when these interests collide, the most appropriate path to resolution can be found in the answer to one simple question: What outcome is best for consumers?

Today's item, which explains what constitutes a "reasonable period of time" to act on a wireless facility siting application, provides a textbook example of the merits of such an approach. On the one hand, states and localities have understandably expressed concern about ceding power over zoning decisions – determinations that are clearly within their purview. On the other hand, the Commission has a strong interest in ensuring the timely rollout of robust wireless networks throughout the country, especially in light of our statutory obligation to develop a national broadband plan. By asking ourselves what is best for consumers – in this case whether a specified reasonable time period for acting on wireless facility siting applications is more advantageous than an

unlimited and undefined timeframe – we are able to arrive at a decision that, in reality, makes good sense for all parties.

There is simply no reason to allow an interminable process for these applications. Consumers suffer when any governmental body – federal, state, or local – unnecessarily stands in the way of making timely determinations that have a direct impact on the quality of their lives. At the same time, consumers are harmed when arbitrary and unreasonable timeframes are imposed that speed up a process, resulting in decisions lacking appropriate due process protections or that are based on insufficient evidence.

Today's compromise preserves, as it must, state and local governments' roles as the arbiters of the merits of wireless service facility siting applications. It also, based on the record developed, provides the presumptively reasonable timeframes required to process these applications. In fact, the item merely adopts the time frames under which many responsible jurisdictions already operate in practice.

The compromise also recognizes, however, that a need has arisen for the Commission to act pursuant to its authority under the Communications Act, in order to ensure that other important Congressional and Commission goals are achieved. By giving meaning to the phrase "a reasonable period of time," we are breathing life into a provision of the Act that is essential to our mobile future. Consumers rely on all of us – federal, state, and local gov-

ernments – to be responsible and responsive, and by ensuring an orderly siting application process, we are doing just that.

I would like to thank the staff of the Wireless Telecommunications Bureau and the Office of the General Counsel for their terrific work on this pro-consumer item. In developing this fine solution to a tricky problem, they have appropriately accounted for all of the legitimate interests involved, and have arrived at an answer that will benefit the provision of mobile services in the near future. I am pleased to support this item. Thank you.

STATEMENT OF COMMISSIONER MEREDITH ATTWELL BAKER

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Wireless broadband is improving the quality of lives across the country. By 2020 it is expected that most people will access the Internet with a wireless device and that most broadband networks will contain wireline and wireless components. As we are learning every day, building the infrastructure necessary to support those networks, to bring the benefits of these networks to the people who need them, any place, any time is an enormous challenge.

Our action today addresses one important aspect of network infrastructure deployment—the time it can take to build out wireless infrastructure--and will help facilitate the process of building or upgrading the towers that are necessary to support our wireless broadband. However, it is only a first step. We will need to continue to look for ways to encourage and facilitate broadband deployments in ways that are consistent with the needs and interests of the communities where they are deployed.

The item before us carefully balances several concerns in accomplishing the Commission's goal. First, the item recognizes the rights and duties of local communities to review and approve applications for zoning approvals for wireless communications facili-

ties. At the same time, the item also appreciates the need to provide greater timeliness and certainty to the men and women who build our mobile broadband infrastructure.

Several years ago, I was involved NTIA's comprehensive effort to lower barriers for broadband innovation, which included a process for streamlining and simplifying permitting on federal lands for rights-of-way, including tower siting. It was a useful undertaking that helped spur wireless deployments in previously unserved areas. I hope our action today will be equally successful.

In general, as we seek to promote and encourage our nation's broadband infrastructure, and particularly mobile broadband, we should always seek ways to streamline the deployment process while at the same time preserving the interests of local communities. I believe the item before us is a step in the right direction.

I am especially pleased that our item today recognizes the streamlined tower citing procedures that are already in place in a number of states across the country, and hope other states will follow their lead as well.

I thank the Chairman and the Bureau leadership for bringing this item before the Commission, and am pleased to join my colleagues in lending my support.

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	WT Docket No. 08-165

ORDER ON RECONSIDERATION

Adopted: August 3, 2010 Released: August 4, 2010

By the Commission:

I. INTRODUCTION

1. Last November, the Commission in a Declaratory Ruling established timeframes for State and local governments to act on wireless facility siting applications. Five organizations representing local governments requested that we reconsider a portion of that ruling relating to the suspension of these time periods when an application is incomplete as filed. Today, we reaffirm our decision that the

timeframes – 90 days for collocations and 150 days for other wireless facility siting applications – are automatically tolled only when the reviewing government notifies the applicant of the incompleteness within the first 30 days after receipt. In so doing, we promote the timely deployment of innovative broadband and other wireless services while preserving the legitimate authority of State and local governments, in furtherance of the goals of our initial decision and consistent with the recommendations of the National Broadband Plan.

II. BACKGROUND

2. On July 11, 2008, CTIA–The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a declaratory ruling clarifying the provisions of the Communications Act that provide for State and local review of personal wireless facility siting applications.[1] Principally, CTIA sought clarification of provisions in Section 332(c)(7) of the Communications Act that it contended were ambiguous and had been interpreted in a manner that allowed zoning authorities to impose unreasonable impediments to wireless facility siting and the provision of wireless services.

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[1] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Declaratory Ruling* of CTIA–The Wireless Association®, WT Docket No. 08-165, filed July 11, 2008 (CTIA Petition).

3. Section 332(c)(7) of the Communications Act generally preserves State and local authority over wireless facility siting, while also placing important limitations on that authority. Section 332(c)(7)(B)(ii) states that State or local governments must act on requests for personal wireless service facility sitings "within a reasonable period of time."[2] Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act" by a State or local government on a personal wireless service facility siting application "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[3]

4. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested comment on the Petition.[4] Hundreds of comments and replies were filed in response to WTB's *Public Notice*, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.[5] In the Commission's *Rul-*

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[2] 47 U.S.C. § 332(c)(7)(B)(ii).

[3] 47 U.S.C. § 332(c)(7)(B)(v). *See also Ruling*, 24 FCC Rcd at 14008-10 ¶¶ 37-42.

[4] Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA–The Wireless Association® To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008) (*Public Notice*).

[5] *See generally* WT Docket No. 08-165.

ing,[6] in response to record evidence of "lengthy and unreasonable delays" involving zoning authority review of tower and antenna siting applications,[7] the Commission, among other things, clarified provisions of Section 332(c)(7) relating to the timeliness of action on these applications.[8] The Commission found that unreasonable delays in a significant number of cases had obstructed the provision of wireless services.[9] Such delays, the Commission concluded, impede advances in coverage, deployment of advanced wireless communications services, and competition that Congress has deemed critical.[10]

5. To address these findings, the Commission interpreted what constitutes a "reasonable pe-

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[6] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (*Ruling*).

[7] *Ruling*, 24 FCC Rcd at 14004-06 ¶¶ 32-33.

[8] *See* 47 U.S.C. § 332(c)(7)(B)(ii),(v); *see also Ruling*, 24 FCC Rcd at 14010-15 ¶¶ 43-53. The Commission also found that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal wireless service facility siting application because service is available from another provider. *See id.* at 14015-19 ¶¶ 54-65. In addition, the Commission denied a request to find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act. *See id.* at 14019-20 ¶¶ 66-67.

[9] *Id.* at 14005-06 ¶¶ 33-34.

[10] *Id.* at 14007-08 ¶ 35.

riod of time" and a "failure to act" under Section 332(c)(7) of the Communications Act. The Commission found that 90 days for processing collocation applications and 150 days for processing applications other than collocations are generally reasonable timeframes.[11] The Commission further determined that failure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days.[12] The Commission defined these time periods as rebuttable presumptions and acknowledged that more time may be needed in individual cases.[13] In particular, in the event an applicant pursues a judicial remedy, the Commission stated that the State or local authority has the opportunity to rebut the presumption that a delay was unreasonable.[14] Ultimately, the Commission stated, the court in each case will find whether the delay was in fact unreasonable under the circumstances of the case.[15] Thus, the Commission's *Ruling* reduces delays in the construction and improvement of wireless networks while preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

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[11] *See Ruling*, 24 FCC Rcd at 14012 ¶ 45.

[12] *See id.*; *see also* 47 U.S.C. § 332(c)(7)(B)(v).

[13] *See, e.g.*, Ruling, 24 FCC Rcd at 14004-05, 14010, 14011 ¶¶ 32, 42, 44.

[14] *See id.* at 14004-05 ¶ 32.

[15] *See id.* at 13995 ¶ 4.

6. The Commission also defined certain circumstances that would warrant adjustments to the presumptive deadlines, including when the applicant fails to submit a complete application or to file necessary additional information in a timely manner.[16] Specifically, the Commission stated that "when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information."[17] This automatic tolling, however, applies only if a zoning authority notifies an applicant within the first 30 days that its application is incomplete.[18] The Commission concluded that allowing for such tolling balances the need for a State or local government to have sufficient time to review an application for completeness with the interests of the applicant against a last-minute decision finding its application incomplete.[19] In addition, the Commission clarified that the presumptive deadlines for acting on siting applications could be extended beyond 90 or 150 days by mutual consent, and that such agreements serve to toll the commencement of the 30-day period for filing suit.[20]

7. On December 17, 2009, a Petition for Reconsideration or Clarification ("Petition") was filed by the National Association of Telecommunications

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[16] *See id.* at 14010 ¶ 42.

[17] *Id.* at 14014 ¶ 52.

[18] *Id.* at 14014-15 ¶ 53.

[19] See id.

[20] *See id.* at 14013 ¶ 49.

Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association ("Petitioners").[21] In their Petition:

> Petitioners seek reconsideration and clarification of the 30 day incompleteness deadline on both legal and policy grounds. First, the Commission exceeded its interpretation of its authority under Section 332(c)(7) in implementing a 30 day review for completeness deadline because the 30 day incompleteness

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[21] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Reconsideration or Clarification* of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, WT Docket No. 08-165, filed Dec. 17, 2009. Also on December 17, 2009, Petitioners filed an Emergency Motion for Stay pending Commission action on their petition. In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Emergency Motion for Stay* of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, WT Docket No. 08-165, filed Dec. 17, 2009. On January 29, 2010, WTB denied this Stay Request. *Order*, 25 FCC Rcd 1215 (WTB 2010).

> deadline imposes additional limitations on personal wireless service facility siting process beyond those stated in Section 332(c)(7). Second, the ability to toll the shot clock must extend to valid reasons beyond the facial incompleteness of the application. Third, the 30 day review period does not reflect the realities of the zoning application process and will result in significant problems for local governments and applicants across the nation and could result in unnecessary litigation and/or siting delays unless modified. Fourth, the rule should be reconsidered based on input received by interested parties because the 30 day completeness rule was developed without public notice and without prior discussions with many interested parties.[22]

Petitioners further state that while they do not agree with the Commission's interpretation of its authority under Section 332 of the Act, the Petition does not challenge that interpretation.[23] The Commission issued a Public Notice on December 23, 2009, asking for comments in response to the Petition on or before January 22, 2010, and reply comments on or before February 8, 2010.[24] The Commission received a total

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[22] Petition at 4.

[23] *See* Petition at 2.

[24] Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration or Clarification of the Commission's Declaratory Ruling Clarifying Provisions in Section 332(c) of the Communications Act, WT Docket No. 08-165, *Public Notice*, 24 FCC Rcd 14703 (WTB 2009). Reply

of 21 comments, oppositions and replies in response to the Petition.[25]

8. On January 12, 2010, the City of Arlington, Texas, filed a petition for review in the United States Court of Appeals for the Fifth Circuit arguing, *inter alia,* that the Ruling generally exceeds the Commission's authority.[26] On February 19, 2010, the Commission filed a motion to hold the case in abeyance pending a decision on the Petition for Reconsideration. The City of Arlington, NATOA *et al.*, and other local government representatives opposed the motion. On March 4, 2010, the Court of Appeals granted the Commission's motion.[27]

III. DISCUSSION

A. Legal Authority to Impose a 30-Day Period for the Automatic Triggering of Tolling

9. Petitioners first contend that the Commission exceeded its own interpretation of its authority under Section 332(c)(7) of the Act.[28] In the *Ruling*, the Commission found that while Congress intended "to preclude the Commission from main-

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comments were not actually required to be filed until February 12, 2010, due to federal government snow closures.

[25] Commenters are listed in the Appendix.

[26] *City of Arlington v. FCC*, No. 10-60039 (5th Cir. filed Jan. 12, 2010).

[27] *City of* Arlington *v. FCC*, No. 10-60039 (5th Cir. order issued March 4, 2010).

[28] Petition at 4.

taining a rulemaking proceeding to impose additional limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7)," the Commission retains the authority to interpret the limitations that Congress imposed in Section 332(c)(7).[29] Nevertheless, Petitioners argue, by allowing State and local governments to toll the timeframe for acting on an application only within 30 days after the application is filed, the Commission created an internal deadline for completeness of an application; and because this deadline is not contained within the Communications Act, petitioners claim, it constitutes a "new limitation" on State and local governments in violation of the Commission's interpretation of its own authority.[30]

10. We disagree with Petitioners' argument that by defining the period within which the timeframe for acting on an application may be tolled automatically, the Commission established a new limitation on State and local governments that was

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[29] *Ruling*, 24 FCC Rcd at 14002 ¶ 25. The Commission was interpreting the Conference Report on the Telecommunications Act, which provides that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated." H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

[30] *See* Petition at 5. Government entities that commented on Petitioners' legal argument that the 30-day period exceeded the Commission's interpretation of its own authority uniformly supported Petitioners' analysis. *See, e.g.*, Los Angeles Comments at 2; San Antonio Comments at 2; Philadelphia Comments at 2; Livonia Comments at 2.

not within the statute. The Commission determined that the timeframe may be tolled due to an application's incompleteness, and then specified the circumstances under which this tolling may occur, in order to define how the 90- and 150-day time periods established in the *Ruling* are to be counted in interpreting "a reasonable period of time." In other words, both the tolling provision and the conditions for its application address to what extent "a reasonable period of time" includes or excludes the time for completing an application upon notification by the State or local government. The period for tolling is an integral part of the Commission's interpretation of what constitutes a "reasonable period of time," and thus is consistent with the Commission's interpretation of its statutory authority.

11. Moreover, the Commission is under no statutory obligation to adopt any provision for automatic tolling of the presumptively reasonable time periods. Petitioners argue that the specification of a time period for automatic tolling is a "new limitation" on State and local governments, and that the absence of such a period would allow a State or local government to unilaterally toll the applicable timeframe at any point in the process. However, the Commission would have been within its discretion to define a "reasonable period of time" without allowing for any automatic tolling. The Commission included the automatic tolling provision to address concerns raised by State and local governments in their comments.[31] CTIA's Petition proposed firm timeframes

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[31] *See Ruling*, 24 FCC Rcd at 14014 ¶ 52, n.155.

and did not contemplate any circumstances under which those timeframes would be tolled.[32]

12. In addition, we note that although Petitioners assume for the purposes of their Petition that the Commission has the authority to interpret what is a "reasonable period of time," their challenge to the tolling period undercuts this assumption. Were State and local governments able unilaterally to toll the decisionmaking period at any time, the Commission's authority to define the presumptively reasonable period in which the statute requires them to act, which Petitioners assert they are not challenging here, would be rendered meaningless.

B. Policy Considerations for the 30-Day Limitation on the Automatic Triggering of Tolling

13. In addition to their legal argument against the 30-day limitation on the automatic triggering of tolling, Petitioners offer three policy arguments for modifying this limitation. First, Petitioners argue that there are legitimate reasons for tolling the applicable shot clock period that the *Ruling* does not address.[33] Petitioners note that sometimes, local governments must get approval or other information from governmental or quasi-governmental entities, such as the Federal Aviation Administration (FAA), Federal or State environmental authorities, and power utilities, before an application can be

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[32] *See generally*, CTIA Petition at 24-27.

[33] *See* Petition at 6.

approved, and that the local government has no control over the time it takes for these entities to complete their review processes.[34] Petitioners contend that under such circumstances, the applications are not "incomplete," nor is the local authority at fault for the delay.[35] Petitioners also argue that in some instances, the applicant's action or inaction in completing obligations related to the review process can prevent that process from being completed within the applicable time period.[36] As an example, Petitioners note that many jurisdictions require the applicant to follow publication and notice requirements before public hearings are convened on a zoning application. Petitioners state that if the applicant makes a mistake in this process, the local government has no legal power to proceed with the hearing.[37]

14. Second, Petitoners predict that the 30-day tolling period will cause various undesirable changes in the way zoning authorities process tower siting applications. They contend that when areas of concern become known after the 30-day period for tolling has passed, many State and local governments will now deny the applications because they will have insufficient time to engage in necessary fol-

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[34] *See id.*; Mentor Comments at 2-3; Fairfax Reply Comments at 4.

[35] *See* Petition at 6.

[36] *See id.* at 7.

[37] *See id. See also* GMTC Comments at 3-4.

low-up exchanges and modifications.[38] In addition, because State and local governments will not want to find themselves in need of additional information after the 30-day period for tolling has lapsed, they will be forced to adhere to rigid application processes instead of the more informal zoning processes that are used for other types of applications.[39] Further, many State and local governments will seek additional information in the initial filing, even though such information would be unnecessary for most applications.[40] Petitioners also express concern that in some instances, rather than face the risk and expense of litigation, a zoning authority with limited resources may grant an application that it could not process within the 90- or 150-day timeframe due to a delay caused by the applicant or a third party, even though the State or local government would likely prevail on the merits.[41]

15. Third, Petitioners argue that due process and fairness require that the rule be reconsidered because the 30-day completeness rule was not contained in CTIA's Petition for Declaratory Ruling, and was developed without public notice and without prior discussions with interested parties.[42] Petition-

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[38] *See id.* at 7-8. *See also, e.g.*, Portland Comments at 4; Albuquerque Comments at 2; Philadelphia Comments at 4-5.

[39] *See* Petition at 8-9. *See also* Hoffmann Estates Comments at 4-5.

[40] *See* Petition at 8-9.

[41] *See* Petition at 7.

[42] *See* Petition at 10. *See also* Albuquerque Comments at 3;

ers clarify in their Reply that they take no position on whether the Commission's decision to create a 30-day period for automatically triggering tolling violated the Administrative Procedure Act; rather, their concern is that the absence of a full record allegedly created unintended consequences.[43]

16. We find Petitioners' policy arguments unpersuasive. Fundamentally, the concerns Petitioners assert are addressed by the framework established in the *Ruling*. In particular, the *Ruling* provides both that the parties may agree to extend the presumptive deadline,[44] and that the reasonableness of delay in any case shall be considered by the court.[45] Thus, a State or local government may seek a tolling agreement with the applicant when a delay outside the control of the State or local government occurs, either due to the applicant or to a third party. Similarly, the State or local government may request extension of the review period when it needs to ask an applicant for additional information or

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Fairfax Reply Comments at 2.

[43] Petitioners Reply Comments at 4.

[44] *See Ruling*, 24 FCC Rcd at 14013 ¶ 49 ("a 'reasonable period of time' may be extended beyond 90 or 150 days by mutual consent of the personal wireless service provider and the State or local government, and . . . in such instances, the commencement of the 30-day period for filing suit will be tolled").

[45] *See id.* at 14010 ¶ 42 ("the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable.").

analysis after the 30-day period for automatically triggering tolling has passed. Should an applicant refuse and instead take the matter to court, the court will be able to consider whether and to what extent the particular circumstances justify a determination that "a reasonable period of time" under the statute is longer than the presumptively reasonable 90- or 150-day period. A court may conclude, for example, that a local government's request for additional information on Day 40 that the applicant did not fully answer until Day 145 was reasonable and warrants a longer "reasonable period of time" than the presumptive deadline provides. Thus, applicants "will have the incentive to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable, or they will incur the costs of litigation and may face additional delay if the court determines that additional time was, in fact, reasonable under the circumstances."[46]

17. For similar reasons, we are unpersuaded that State and local governments will find it necessary to adopt rigidly formal review processes, or to require unnecessary information as part of the application, in response to the 30-day period for automatically triggering tolling. As discussed above, the regime described in the *Ruling* incorporates flexibility to address unanticipated situations. Given this flexibility, we expect that governments and applicants alike will recognize the costs of unnecessarily formal procedures and avoid them where possible. Similarly, all parties will have incentives

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[46] *Ruling*, 24 FCC Rcd at 14008-09 ¶ 38.

to avoid the uncertainty of litigation that may result from the unnecessary denial of an application.[47]

18. We recognize that defending litigation imposes costs, and that in some instances a State or local government may choose to grant an application rather than incur those costs. At the same time, an overly broad tolling regime would risk countenancing delays under circumstances where they would not be reasonable. Moreover, it is impractical to create in advance a comprehensive list of circumstances that would or would not reasonably merit delay. Therefore, any automatic tolling regime must necessarily balance the risks of engendering litigation and condoning excessive delay. In the *Ruling*, the Commission determined that in the common case of an incomplete application that is discovered within 30 days, a delay should be presumed reasonable and the review period should be automatically tolled in order to avoid unnecessary litigation. Where the delay is due to other causes or the incompleteness is identified after more than 30 days, case-by-case consideration, in the first instance by the parties, and then by the court if necessary, is more prudent. Nothing in the record on reconsideration causes us to revisit this balance.

19. With respect to Petitioners' assertion that the Commission did not seek or receive sufficient information on which to base its decision to limit the period for automatic tolling, we find that the record demonstrates otherwise, and that the *Rul-*

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[47] *See id.* at 14008-09 ¶ 39.

ing reflects this. Various government entities raised the issue that rigid timeframes do not account for incomplete filings.[48] MetroPCS proposed a three-day review period for a State or local government to determine whether an application is complete, a proposal that CTIA supported.[49] Later, PCIA proposed a 10-day period for tolling,[50] and then a 10-business-day period.[51] While the specific length of 30 days was not proposed in the record, the Commission reviewed state statutes that were submitted into the record in selecting that time period, concluding that 30 days "gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete."[52] To the extent Petitioners are concerned that any lack of comment impeded the Commission from taking into account the ramifications of the 30-

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[48] *See id.* at 14014 ¶ 52 n.155.

[49] *See id.* at 14014 ¶ 52, nn. 156-157.

[50] *See Ex Parte* Letter from Michael D. Saperstein, Jr., Esq., Public Policy Analyst, PCIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, Att. at 7 (filed Dec. 5, 2008).

[51] *See Ex Parte* Letter from Michael Fitch, Esq., President and CEO, PCIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, at 3-4 (filed Oct. 23, 2009).

[52] *Ruling*, 24 FCC Rcd at 14015 ¶ 53.

day period for tolling,[53] our review of the issues raised here addresses this concern.

C. Other Issues

20. Several commenters raise issues that are beyond the scope of the Petition. San Antonio asserts that "*all* of the *CTIA Ruling's* interpretations of Section 332(c)(7)(B)(i), (ii) and (v) exceed the Commission's authority. . ." and that the decision is "a rulemaking in disguise" that "fails to comply with the Regulatory Flexibility Act."[54] Los Angeles claims that the 90-day period for collocation applications is too short.[55] Because these matters are outside the scope of the Petition, they should have been raised through timely Petitions for Reconsideration, and not for the first time in comments on Petitioners' Petition for Reconsideration. Accordingly, we do not consider them here.

21. In Comments to the Petition, Albuquerque raises a new issue, requesting that the Commission "clarify" that the 90- or 150-day review period is reset to zero whenever a State or local government receives new material submitted to remedy a facially deficient application.[56] The *Ruling*, however, expressly states that where an application is found to be incomplete as filed during the 30-day review period, "the timeframes do not include the time that

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[53] *See* Petitioners Reply Comments at 4.

[54] San Antonio Comments at 2.

[55] Los Angeles Comments at 3.

[56] Albuquerque Comments at 2.

applicants take to respond to State and local governments' requests for additional information."[57] This means that when the information is requested, the clock stops, and when the applicant provides the additional information, the clock resumes (thereby reflecting the passage of time equivalent to the time from the initial filing of the siting application to the date that the additional information was requested). Because Albuquerque's request for clarification proposes – for the first time after the deadline for filing petitions for reconsideration – to alter this approach, the proposal is, in fact, an untimely request for reconsideration of this part of our decision. In any event, we are not persuaded that resuming the clock where it left off is inappropriate in this situation. The time spent determining that the application is incomplete is time spent reviewing the application, and therefore reasonably counts toward the 90 or 150 days.

22. IMLA argues that Congress's use of the term "final action" in Section 332(c)(7)(B)(v), and the absence of "final" in the requirement in Section 332(c)(7)(B)(ii) that the State or local government "shall act," create a distinction between the trigger for a lawsuit based on State or local government action and the trigger for a lawsuit based on a failure to act. IMLA contends that, accordingly, the Commission must modify the *Ruling* to expressly provide that the 90- and 150-day time periods only apply to initial zoning actions, and not to the time period from the initial decision until completion of final ac-

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[57] *Ruling*, 24 FCC Rcd at 14014 ¶ 52.

tion on an administrative appeal.[58] In addition to arguing that IMLA's request is beyond the scope of the issues raised in the Petition for Reconsideration, CTIA contends that the statutory reference to "final action" is irrelevant when there has been no action.[59] IMLA's request is outside the scope of the Petition, and we decline to render the ruling that IMLA requests. Given the many variations that are possible in local procedures and factual circumstances, it is appropriate for the court to determine whether the decisionmaking body has failed to act within the specified timeframe and whether the presumptive timeframe for action is reasonable in each case.

IV. CONCLUSION

23. We conclude that in interpreting Section 332(c)(7), the Commission has the authority to define a 30-day period after an application for wireless facility siting is filed during which a State or local government may toll the presumptive deadline for review due to the application's incompleteness, and that this 30-day period is both reasonable and supported by the record. We therefore deny the Petition.

V. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 332(c)(7), and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r),

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[58] *See* IMLA Comments at 7-10.

[59] *See* CTIA Reply Comments at 9-10.

332(c)(7), 405(a), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration or Clarification filed by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

List of Commenters

Oppositions and Comments

Charter Township of Waterford, Michigan (Waterford)
City of Albuquerque, New Mexico (Albuquerque)
City of Centerville, Minnesota, Member of the North Metro Telecommunications Commission (Centerville)
City of Livonia, Michigan (Livonia)
City of Los Angeles, California (Los Angeles)
City of Mentor, Ohio (Mentor)
City of Philadelphia, Pennsylvania (Philadelphia)
City of Portland, Oregon (Portland)
City of San Antonio, Texas (San Antonio)
CTIA – The Wireless Association (CTIA)
Greater Metro Telecommunications Consortium (GMTC)
International Municipal Lawyers Association (IMLA)
PCIA – The Wireless Infrastructure Association (PCIA)
T-Mobile USA, Inc. (T-Mobile)
Verizon Wireless
Village of Hoffman Estates, Illinois (Hoffman Estates)

Reply Comments

CTIA
Fairfax County, Virginia (Fairfax)
National Association of Telecommunications Officers and Advisors, The United States Conference of Mayors, National League of Cities, National

Association of Counties, American Planning Association, and the City of Laredo, Texas (Petitioners)
PCIA

Late-Filed Reply Comment
Kiku Lani Iwata

APPENDIX D

Date Filed: 3/29/2012

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-60039

CITY OF ARLINGTON, TEXAS, CITY OF SAN ANTONIO, TEXAS
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,
Respondents

Petition for Review of an Order of the Federal Communications Commission

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ON PETITION FOR REHEARING EN BANC

(Opinion ___, 5 Cir., ____, ____, F.3d ____)

Before DAVIS, PRADO, and OWEN, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc filed by **Intervenors City of Dubuque, Iowa; City of Los Angeles, California; Los Angeles**

County, California; Texas Coalition of Cities for Utility Issues, and Petitioner City of Arlington, Texas as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

(x) Treating the Petition for Rehearing En Banc filed by **Intervenor Cable and Telecommunications Committee of the New Orleans City Council** as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Priscilla A. Owen
United States Circuit Judge

APPENDIX E

STATUTES AND LEGISLATIVE HISTORY

FEDERAL STATUTES

Section 1 of the Communications Act,
47 U.S.C. § 151 ..... 199a

Section 4(i) of the Communications Act,
47 U.S.C. § 154(i) 200a

Section 201(b) of the Communications Act,
47 U.S.C. § 201(b) 200a

Section 303(r) of the Communications Act,
47 U.S.C. § 303(r) 201a

Sections 401 of the Communciations Act,
47 U.S.C. § 401 ..... 202a

Section 621 of the Communications Act,
47 U.S.C. § 541 ..... 203a

Section 704(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996) 208a

LEGISLATIVE HISTORY

H.R. Rep. No. 104-458, at 207-208 (1996) (Conf. Report) 208a

H.R. Rep. No. 104-204, 1996 U.S.C.C.A.N. 10 (1995) 212a

Section 1 of the Communications Act, 47 U.S.C. § 151

Purposes of Act; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make avail-able, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with ade-quate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional author-ity with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commis-sion to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i)

Federal Communications Commission

. . .

(i) Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 201(b) of the Communications Act, 47 U.S.C. § 201(b)

Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to fur-nish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commis-sion, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the pub-lic interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby

declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common car-rier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the pub-lic interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

Section 303(r) of the Communications Act, 47 U.S.C. § 303(r)

General Powers of Commission

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the

provisions of this Act, or any international radio or wire communications treaty or conven-tion, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Sections 401 of the Communciations Act, 47 U.S.C. § 401

Enforcement provisions

(a) Jurisdiction. The district courts of the United States shall have jurisdiction, upon application of the Attorney Gen-eral of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) Orders of Commission. If any person fails or neglects to obey any order of the Commission other than for the pay-ment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobe-dience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, man-datory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from

further dis-obedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute. Upon the request of the Commission it shall be the duty of any district attorney [United States Attorney] of the United States to whom the Commission may apply to institute in the proper court and to prosecute un-der the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the pro-visions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

Section 621 of the Communications Act, 47 U.S.C. § 541

General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances.

(1) A franchising authority may award, in accordance with the provisions of this title [47 USCS §§ 521 et seq.], 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions

of section 635 [47 USCS § 555] for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure--

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority--

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law.

(1) Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3) (A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services--

(i) such cable operator or affiliate shall not be required to obtain a franchise under this title [47 USCS §§ 521 et seq.] for the provision of telecommunications services; and

(ii) the provisions of this title [47 USCS §§ 521 et seq.] shall not apply to such cable operator or

affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this title [47 USCS §§ 521 et seq.] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof--

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title [47 USCS §§ 521 et seq.] with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 611 and 612 [47 USCS §§ 531 and 532], a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility. Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined.

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to title II of this Act [47 USCS §§ 201 et seq.]. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this title [47 USCS §§ 521 et seq.] shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 3 [47 USCS § 153].

(e) State regulation of facilities serving subscribers in multiple dwelling units. Nothing in this title [47 USCS §§ 521 et seq.] shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor. No provision of this Act shall be construed to--

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

Section 704(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996)

Facilities Siting; Radio Frequency Emission Standards.

. . .

(b) Radio Frequency Emissions. Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

H.R. Rep. No. 104-458, at 207-208 (1996) (Conf. Report)

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land

use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.

When utilizing the term "functionally equivalent services" the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a

commercial district, it must also grant a permit for a competitor's 50 foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase "substantial evidence contained in a written record" is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted

pursuant to section 704(b) concerning such emissions.

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the

extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

H.R. Rep. No. 104-204,
1996 U.S.C.C.A.N. 10, 25 (1995)

Facilities Siting; Radio Frequency Emission Standards.

(a) National Wireless Telecommunications Siting Policy.—Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) Facilities siting policies.—(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account—

(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

(C) The policy prescribed pursuant to this paragraph shall ensure that—

(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof—

(I) is reasonable, nondiscriminatory, and limited to the minimum necessary to accomplish the State or local government's legitimate purposes; and

(II) does not prohibit or have the effect of precluding any commercial mobile service; and

(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile

services shall be in writing and shall be supported by substantial evidence contained in a written record.

(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.".

(b) Radio Frequency Emissions.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property.—Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These

procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable cost-based fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Nos. 11-1545 & 11-1547

Supreme Court, U.S.
FILED
AUG 28 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,
Petitioners,

AND

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS CTIA—THE WIRELESS ASSOCIATION® AND CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS IN OPPOSITION

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QUESTION PRESENTED

The question presented by these petitions is whether, through the general authorizing provisions of the Communications Act of 1934, such as 47 U.S.C. §§ 201(b) and 303(r), Congress conveyed jurisdiction to the Federal Communications Commission to interpret the substantive limitations on local authority imposed by Section 332(c)(7)(B) of that Act, 47 U.S.C. § 332(c)(7)(B).

The primary question urged by petitioners is whether the Commission's determination that it had such jurisdiction is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That question, however, is presented here only if the Court were to conclude that Congress did not speak clearly as to the Commission's jurisdiction.

For the reasons set forth in this Brief in Opposition, the Commission's jurisdiction in this case was in fact clear under the statute. Therefore, no *Chevron* issue is presented.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents CTIA—The Wireless Association® and Cellco Partnership d/b/a Verizon Wireless state the following:

CTIA—The Wireless Association® ("CTIA") is a Section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia and represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

Cellco Partnership d/b/a Verizon Wireless ("Cellco") has four partners. Two of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Mobile Systems, Inc. and GTE Wireless Incorporated (collectively, the "Verizon Partners"). Neither of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). Neither of the Vodafone Partners is publicly held. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

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INTRODUCTION

The petitions challenge a declaratory ruling (the "Ruling") by respondent Federal Communications Commission ("FCC" or "Commission") in which the agency interpreted a unique provision of the Communications Act of 1934 that both preserves and restricts local zoning authority over approvals for wireless facility construction. The provision at issue, 47 U.S.C. § 332(c)(7)(B), prohibits local governments from unreasonably delaying action on wireless facility siting requests and authorizes expedited federal judicial review of local actions or failures to act. Based on evidence provided by respondents CTIA—The Wireless Association® ("CTIA") and Cellco Partnership ("Verizon Wireless"; collectively with CTIA, "wireless respondents"), the Commission concluded that unreasonable delays (ranging from many months to several years) were occurring in a substantial number of cases, in violation of the Communications Act. It then issued the Ruling, which (among other things) establishes presumptively reasonable 90- and 150-day periods within which the Commission found local governments should be able to act in the majority of cases.

Petitioners (the "Cities" and "CTC") are local governments that wish to delay wireless facility siting requests for longer than the Commission's 90- and 150-day timetables permit. They argue that the Commission lacked jurisdiction to issue the Ruling. The Commission rejected this argument, relying on its general authority to interpret the Communications Act and rejecting petitioners' arguments that Congress had withdrawn that authority as to § 332(c)(7)(B). The Fifth Circuit stated that it deferred to that ruling under *Chevron U.S.A. Inc. v.*

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Petitioners now urge the Court to grant certiorari to answer the question whether *Chevron* deference applies to an agency's statutory construction when the agency is determining the extent of its own statutory authority.

These petitions are poor vehicles to answer that question because the Commission's jurisdiction to issue the Ruling is clear. Both the plain text of the Communications Act and this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), compel the conclusion that Congress has spoken directly to the question whether the Commission had authority to construe § 332(c)(7)(B). Petitioners' attempts to argue that Congress withdrew that authority in other parts of § 332(c)(7)(B) are too flawed even to demonstrate ambiguity, much less to establish Congress's intent. Neither of the provisions to which they point restricts the Commission's jurisdiction either expressly or by any reasonable implication. If the Court were to grant certiorari, it would likely affirm without any need to apply *Chevron* and would not advance the law in any meaningful way. Accordingly, certiorari should be denied.

STATEMENT

1. Americans' use of wireless communications services has grown enormously over the past two decades, and it continues to grow at a rapid pace. As of December 2011, there were 331.6 million U.S. wireless subscriber connections – reflecting an increase of nearly 100 million during the previous five years alone.[1] The market to serve those subscribers is fiercely competitive: as of February 2011, more than 91% of Americans can choose from four or more facilities-based wireless providers; and, in 2009, about 66 million wireless consumers took advantage of such competitive choices and changed wireless carriers.[2]

Everyone benefits from the nationwide growth of competitive wireless services. Consumers use wireless services for enhanced productivity, for greater personal convenience, and for a wide array of entertainment and leisure options. The availability of ubiquitous, seamless wireless coverage also protects public safety by ensuring quick, reliable access to emergency services. And the wireless industry is also a major driver of capital investment and creator of jobs.[3]

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[1] *See* CTIA, *Wireless Quick Facts*, *at* http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited Aug. 24, 2012). This brief cites up-to-date statistics and background information on the wireless industry. Citations to similar but older information from the record before the Commission are available in the wireless respondents' court of appeals brief at pages 5 to 7.

[2] *See* CTIA, *Innovation and Competition*, *at* http://files.ctia.org/pdf/020411_-_Innovation_Competition.pdf (last updated Feb. 2011).

[3] *See generally* CTIA, *The U.S. Wireless Industry Overview*, *at* http://files.ctia.org/pdf/042412_-_Wireless_Industry_Overview.pdf (last updated Apr. 25, 2012).

Wireless carriers' ability to deliver the benefits of seamless nationwide coverage, however, depends on their ability to build wireless facilities. Though wireless service is widely acknowledged to be popular and beneficial, the facilities on which it depends can sometimes be unpopular with nearby property owners. As courts faced with wireless tower siting controversies have noted, people tend to "find wireless facilities unsightly" and to "worry [that they] lower property values." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 51 n.9 (1st Cir. 2009). Local residents sometimes respond to these concerns by exerting "pressure" on their local government representatives "to tighten and strictly enforce zoning restrictions on wireless facilities, creating numerous pockets of resistance for wireless carriers." *Id.*

2. Recognizing this "'not in my backyard' . . . problem," *Omnipoint Holdings*, 586 F.3d at 51 n.9,[4] and the threat it poses to a truly national wireless network, Congress acted in 1996 "to encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] . . . the impediments imposed by local governments upon the installation of [wireless] facilities." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (internal quotation marks omitted). Congress's chosen means for doing

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[4] *See also, e.g., New York SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 717 n.4 (S.D.N.Y. 2009) ("There is a NIMBY (not in my backyard) problem with regard to [wireless] towers. While everyone wants good cell service, homeowners are concerned about the effect of the unsightly structures on property values."), *aff'd*, 612 F.3d 97 (2d Cir. 2010) (per curiam); Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445, 455-57 (2005) (discussing this problem generally with regard to wireless facilities).

so was to "impose[] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* Those limitations are embodied in 47 U.S.C. § 332(c)(7), one of the many pro-competitive reforms and additions to the Communications Act that were made as part of the Telecommunications Act of 1996 ("1996 Act").

Section 332(c)(7) forbids any state or local government from "unreasonably discriminat[ing] among providers of functionally equivalent [personal wireless] services" and from "prohibit[ing] or . . . effect[ively] . . . prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II). A state or local government must also respond to a wireless facility siting or modification request "within a reasonable period of time . . . , taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). If it denies the request, it must do so "in writing," and its action must be "supported by substantial evidence contained in a written record." *Id.* § 332(c)(7)(B)(iii). In addition, it may not deny a request "on the basis of the environmental effects of radio frequency emissions" so long as the provider involved has complied with FCC regulations on that subject. *Id.* § 332(c)(7)(B)(iv).

Congress further provided that, other than the limitations set forth in § 332(c)(7), "nothing in [the Communications Act] shall limit or affect [state and local] authority . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(A). Congress created a judicial cause of action for "[a]ny person adversely affected by any final action or failure to act by a State or local government or any

instrumentality thereof that is inconsistent with [§ 332(c)(7)]" and directed that any such action be "hear[d] and decide[d] . . . on an expedited basis." *Id.* § 332(c)(7)(B)(v). Separately, it authorized anyone aggrieved by a violation of § 332(c)(7)(B)(iv), the radio frequency provision, to seek relief from the Commission. *See id.*

3. On July 11, 2008, respondent CTIA filed a petition for a declaratory ruling from the Commission. *See* FCC C.A. E.R. Tab 1. CTIA explained that a significant and unacceptable number of wireless tower siting requests were being delayed past any reasonable period of time, contrary to the mandate of § 332(c)(7)(B)(ii). CTIA presented evidence, which the Commission later found credible, to support these contentions. As the Commission later explained in the Ruling:

> [B]ased on data [CTIA] compiled from its members, there were [in 2008] more than 3,300 pending personal wireless service facility siting applications before local jurisdictions. "Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years*." Moreover, almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years.

Pet. App. 98a (fourth and fifth alterations in original; footnotes omitted).[5] CTIA also submitted examples of

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[5] The delays in collocation applications were particularly probative evidence of unreasonable local conduct because collocation involves simply sharing an existing facility rather than building a new one. *See* Pet. App. 116a-117a (adopting an

situations in which particular localities had delayed proceedings for multiple years, held dozens of hearings, and ultimately forced a wireless carrier to go to court before construction could begin. *See* FCC C.A. E.R. Tab 1, at 14-15.

Wireless carriers with direct experience of drawn-out controversies over tower siting submitted additional evidence in support of CTIA's position. For example, Verizon Wireless reported that it had more than 350 new site applications pending, of which more than half had been pending for more than six months, and "nearly 100" for more than a year. Pet. App. 65a-66a. In addition, "in Northern California, 27 of 30 [Verizon Wireless] applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved"; and, "in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months." *Id.* at 98a-99a (internal quotation marks omitted).[6]

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industry definition of collocation that covers applications that "do[] not involve a 'substantial increase in the size of a tower'"). There is no legitimate local interest in taking a year – much less three – to decide a collocation application.

[6] The Commission also had before it comments from T-Mobile, reporting that just under a third of its then-pending applications (both for new facility applications and for collocations) had been delayed for more than a year, *see* Pet. App. 65a; Sprint Nextel, reporting delays of 28 to 36 months in certain California communities, *see id.* at 98a; the California Wireless Association, reporting delays of 16 months to 2 years in California, *see id.* at 98a n.103; and NextG Networks, reporting delays of 10 to 25 months, *see id.* at 99a. *See also id.* at 66a, 98a-100a (additional data for T-Mobile and Alltel).

CTIA further explained that, although these lengthy delays unquestionably at some point became unreasonable "failure[s] to act" for which district courts could grant a remedy under § 332(c)(7)(B)(v), the 1996 Act was silent as to exactly when a locality's delay became an actionable failure to act. To solve this problem, CTIA asked the Commission to declare specific periods beyond which any delay would be a failure to act within "a reasonable period of time," and therefore would violate § 332(c)(7)(B)(ii). CTIA initially sought a 45-day period for collocation applications and a 90-day period for new facility applications. CTIA also sought a declaration that, in light of the 1996 Act's strong policy preference for competition among different service providers, it is an unlawful "prohibit[ion] . . . [on] the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II), for a locality to deny one wireless provider permission to serve a particular area solely because another provider was already serving the same area.[7]

A number of local governments, including the Cities and CTC, filed comments in opposition to CTIA's petition for declaratory ruling. Among other things, they argued that the Commission lacked jurisdiction to interpret § 332(c)(7)(B).

4. On November 18, 2009, the Commission issued a declaratory ruling ("Ruling"), granting some (but not all) of the relief requested in the petition.

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[7] CTIA further requested that the Commission declare that local ordinances that automatically required a wireless provider to seek a zoning variance in order to build a wireless tower or facility were preempted by 47 U.S.C. § 253(a). The Commission did not act on this request because it found that any such ruling should occur in the case of a specific challenge to a specific ordinance.

It concluded that it had authority to interpret § 332(c)(7)(B), relying on 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r), the statutory provisions that give the FCC general authority to execute, interpret, and enforce the Communications Act, and otherwise to perform its functions. *See* Pet. App. 87a-88a. It rejected contentions by opponents of the petition that either § 332(c)(7)(A) or § 332(c)(7)(B)(v) should be construed to make exceptions to the Commission's general rulemaking authority. In reaching this consideration, the Commission relied on the plain text granting it rulemaking authority and also on this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the Sixth Circuit's decision in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). *See* Pet. App. 87a-90a. It also concluded that its rulings were consistent with § 332(c)(7)(A) because it was not "imposing *new* limitations on State and local governments," but was "merely interpret[ing] the limits Congress already imposed on State and local governments." *Id.* at 90a-91a.

On the merits, the Commission determined that CTIA and individual providers had provided "extensive statistical evidence" to support a finding of "unreasonable delays" and "obstruct[ion]," while the state and local governments that had attempted to rebut that evidence had produced no more than "isolated anecdotes." *Id.* at 100a-102a. It further found that local governments should generally be reasonably able to review applications for collocations within 90 days and for new wireless facilities within 150 days. *See id.* at 115a-116a. Although CTIA, Verizon Wireless, and other industry participants had presented evidence suggesting that it

would be reasonable to process applications in half that time, the Commission reasoned that it should allow more time for "explor[ing] collaborative solutions," for localities "to prepare a written explanation of their decisions," and for "reasonable, generally applicable procedural requirements in some communities." *Id.* at 114a-115a. It also gave weight to the processing times described by local-government commenters, almost all of which were consistent with its 90- and 150-day findings. *See id.* at 117a-118a.

Based on its findings, the Commission declared that a local government presumptively fails to act on a collocation application within a reasonable period of time if it does not act within 90 days for a collocation or 150 days for a new facility. *See id.* at 96a-97a. At that time, a "failure to act" has occurred within the meaning of § 332(c)(7)(B)(v), and the provider may seek judicial review – though the local government remains free to show in court that the circumstances of a particular application made the time it took reasonable. *See id.* at 97a, 114a-115a. The Commission declined to adopt any presumption about the remedy for unreasonable delay, finding it more consistent with congressional intent for the courts to determine such questions on a case-by-case basis. *See id.* at 108a-109a.

In a separate section of the Ruling, the Commission also agreed with CTIA "that a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers [already] serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services.'" *Id.* at 127a (quoting CTIA's petition and 47 U.S.C. § 332(c)(7)(B)(i)(II))

(second alteration in original; footnote omitted). "[A]ny other interpretation of [§ 332(c)(7)(B)(i)(II)]," it concluded, "would be inconsistent with the [1996] Act's pro-competitive purpose." *Id.* at 128a.[8]

5. Petitioners City of Arlington and City of San Antonio filed petitions for review in the Fifth Circuit, again arguing that the Commission lacked jurisdiction to interpret § 332(c)(7)(B) and also raising various other arguments that the Commission's decisions were arbitrary, capricious, and otherwise contrary to statute. On January 23, 2012, the court of appeals denied Arlington's petition on the merits and dismissed San Antonio's for lack of jurisdiction. *See* Pet. App. 1a-2a.[9]

The court of appeals held that the Commission had statutory authority to issue the Ruling. *See id.* at 34a-51a. It began by considering whether *Chevron* deference applied. It acknowledged that the circuits disagree over whether to "apply *Chevron* deference to disputes over the scope of an agency's jurisdiction," but concluded that Fifth Circuit precedent required it to apply *Chevron* to such disputes. *Id.* at 37a. It accordingly first considered whether the statute "unambiguously indicate[d] Congress's intent to preclude

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[8] A group of local government organizations sought reconsideration of the Ruling, which the agency denied on August 4, 2010. *See* Pet. App. 172a-195a. None of the petitioners in this Court was in that group, and neither petition for certiorari appears to raise the issues addressed in the order denying reconsideration.

[9] The court of appeals held that it lacked jurisdiction over San Antonio's petition because that petition had not been filed within the 60-day time limit imposed by 28 U.S.C. § 2344. *See* Pet. App. 12a-17a. San Antonio does not challenge that ruling before this Court.

the FCC from implementing § 332(c)(7)(B)(ii) and (v)," *id.* at 40a, and held that it did not.

As to § 332(c)(7)(A), the court of appeals reasoned that the provision "certainly prohibits the FCC from imposing restrictions or limitations [on state or local zoning authority] that cannot be tied to the language of § 332(c)(7)(B)," but does not speak to the question "[w]hether the FCC retains the power of *implementing* those limitations." *Id.* at 41a (emphasis added). It further held that § 332(c)(7)(B)(v), although establishing judicial jurisdiction over "*specific* dispute[s] between a state or local government and persons affected by the government's failure to act," does "not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those" specific disputes. *Id.* at 42a-43a (emphasis added). Accordingly, it proceeded to *Chevron* step two, where it found the FCC's interpretation reasonable despite petitioners' invocation of legislative history and the presumption against preemption. *See id.* at 45a-51a.

The court of appeals also rejected Arlington's additional arguments that the Ruling was issued without proper notice and comment, *see id.* at 17a-31a; that the Ruling violated certain state and local governments' due process rights, *see id.* at 31a-34a; that the 90- and 150-day presumptive time periods were inconsistent with the Communications Act, *see id.* at 51a-63a; and that the Commission had acted arbitrarily and capriciously, *see id.* at 63a-67a.

Petitioners sought rehearing en banc, which the court of appeals denied. *See id.* at 196a-197a.

REASONS FOR DENYING THE PETITIONS

I. THIS CASE IS A POOR VEHICLE TO DECIDE WHETHER *CHEVRON* DEFERENCE APPLIES TO AN AGENCY'S DETERMINATION OF ITS JURISDICTION

The question whether *Chevron* deference can apply to an agency's determination of its statutory jurisdiction may well warrant this Court's review. These petitions, however, are unsuitable vehicles for answering that question. That is because, if this Court were to grant certiorari, it would likely conclude that the Commission clearly did have jurisdiction to issue the Ruling in dispute. Under *Chevron* or any other standard of statutory construction, "[i]f the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842. The Court would accordingly have no need to resolve the degree of judicial deference due to the agency, and the resulting affirmance would not resolve any unsettled question or advance the law in any meaningful way.

In several previous cases, the Court has not decided whether *Chevron* applies to issues concerning an agency's jurisdiction after finding it clear either that the agency *had* jurisdiction or that the agency *lacked* jurisdiction. For one example, in *California Dental Association v. FTC*, 526 U.S. 756 (1999), the Court "ha[d] no occasion to review the [Federal Trade Commission's ("FTC")] call for deference" on a question of the agency's own jurisdiction because the FTC's interpretation of the statute was "clearly the better reading of the statute under ordinary principles of construction." *Id.* at 766. For another, in *Dole v. United Steelworkers*, 494 U.S. 26 (1990), the Court declined to apply *Chevron* to a jurisdictional question because the statute "clearly expresse[d] Congress' intention" to withhold authority. *Id.* at 42;

cf. id. at 54-55 (White, J., dissenting) (arguing that *Chevron* should apply even though the question was jurisdictional). Other examples are not difficult to find.[10]

The Court's history of declining to reach the *Chevron* issue in other cases suggests that, before committing the resources necessary for plenary review of this case, it is prudent to take an initial look at the underlying statutory question and to consider whether that question appears sufficiently close that this Court would likely find *Chevron* relevant. As explained in Part II.B, the statutory question is not close. Accordingly, further review is not warranted.[11]

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[10] *See, e.g., Rapanos v. United States*, 547 U.S. 715, 739, 758, 788 (2006) (containing a plurality opinion, a concurrence, and a dissent discussing *Chevron* as applied to a jurisdictional statute, but no holding of the Court); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citing *Chevron* before resolving a dispute over agency jurisdiction to regulate tobacco products, but concluding that "Congress ha[d] directly spoken to the issue").

[11] The Fifth Circuit's statement that the Communications Act was "ambiguous with respect to the FCC's authority" is not to the contrary when read in context. Pet. App. 44a-45a. From the court of appeals' perspective, the *Chevron* question was already settled as a matter of circuit precedent. *See id.* at 37a & n.94. Accordingly, the only question before that court was "whether the[] provisions [cited by petitioners] unambiguously indicate[d] Congress's intent to *preclude* the FCC from implementing" the limits that the Communications Act undisputedly places on local authority. *Id.* at 40a (emphasis added). Because it did not face any uncertainty about whether *Chevron* applied, the court of appeals had no reason to linger on the question whether to end the case on *Chevron* step one or step two. This Court, by contrast, would be confronted with a significant *unresolved* question about *Chevron*'s scope and would accordingly look harder at whether the underlying statutory question required resort to *Chevron*.

In addition, this case is a flawed vehicle for developing the *Chevron* doctrine because the Fifth Circuit's opinion leaves open an alternate ground for affirmance that does not implicate *Chevron* at all. The Commission defended its order below in part on the theory that "[a]ny rules that the Commission adopted in the [Ruling] were interpretative," rather than substantive. FCC C.A. Br. 54. The Commission made this argument in the context of rebutting an alleged failure to provide proper notice and comment, and the court of appeals did not reach the question because it found that any such error was harmless. *See* Pet. App. 26a. But if the Ruling was interpretative, then the question whether it was within the agency's general *substantive* rulemaking authority is no longer presented, because "any agency has the inherent power to issue interpretative rules." I Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 433 (5th ed. 2010). Accordingly, the judgment of the court of appeals can stand on that basis without any need to consider the extent of the agency's general authority at all, much less the precise scope of *Chevron* deference.

II. THE QUESTION WHETHER THE FCC HAD JURISDICTION TO ISSUE THIS PARTICULAR DECLARATORY RULING DOES NOT WARRANT REVIEW

1. Neither the Cities nor CTC argue that there is any circuit split relevant to the underlying statutory question whether the Commission had jurisdiction to interpret and implement § 332(c)(7). The closest circuit authority is *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), in which the Sixth Circuit rejected a challenge to FCC rulemaking authority based on arguments very similar to those that petitioners advance in this case. *See id.* at

773-74; Pet. App. 43a-44a (discussing *Alliance for Community Media*); *id.* at 88a-90a (same). Petitioners attempt (unpersuasively) to distinguish *Alliance for Community Media*,[12] but make no claim that it or any other authority creates a conflict that would warrant review.

2. As for the merits, the FCC's jurisdiction to issue the Ruling in this case is clear under § 201(b) of the Communications Act as interpreted by this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). By its plain terms, § 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Act. 47 U.S.C. § 201(b). Relying on that general grant of rulemaking authority, *Iowa Utilities Board* held that, as a general matter, the FCC has jurisdiction over matters that are within the "substantive reach" of the Communications Act – including parts of the 1996 Act that extended that reach. 525 U.S. at 380. Both the agency and the court of appeals correctly relied upon that general principle. *See* Pet. App. 39a, 87a.

Section 332(c)(7)(B) extends the substantive reach of the Communications Act to impose limitations on state and local decisionmaking concerning wireless tower siting, including the requirement that local

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[12] The Cities' sole ground for distinguishing *Alliance for Community Media* is that the Cable Television Consumer Protection and Competition Act of 1992, which the Sixth Circuit construed in that case, did not include language comparable to § 332(c)(7)(A), on which they principally rely. Because their arguments based on § 332(c)(7)(A) lack merit, *see infra* pp. 18-20, their attempted distinction does as well. CTC does not cite *Alliance for Community Media* in its petition at all.

review of a wireless facility siting application be limited to a "reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). Similarly, § 332(c)(7)(B) forbids any state or local government action that "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services." *Id.* § 332(c)(7)(B)(i)(II). Congress imposed those "specific limitations on the traditional authority of state and local governments" in order "to encourage the rapid deployment of new telecommunications technologies." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (internal quotation marks omitted).

Thus, § 332(c)(7)(B) "unquestionably" conveys Congress's intent to "take[] . . . away from the States," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, exclusive control of the timing and content of local decisions about wireless tower siting. As a result, this is *not* a case in which state law, rather than federal law, governs the subject matter in dispute. *Cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*") (holding that 47 U.S.C. § 152(b) "fences off from FCC reach or regulation" certain subjects of intrastate rate regulation, which are regulated by state commissions). Nor is it a case in which an area is left to unregulated private action, to be shaped by market competition rather than by either federal or state law. *Cf. Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (holding that the FCC had failed to justify its attempt to regulate an internet service provider). Rather, it is a case in which the Communications Act undisputedly imposes substantive restrictions on local government entities as a matter of federal law.

Accordingly, the court of appeals could and should have resolved this question based on this Court's

holding that an "expansion of the substantive scope of the [Communications] Act" means a "*pari passu* expansion of Commission jurisdiction." *Iowa Utils. Bd.*, 525 U.S. at 380. To be sure, that is a statutory holding: Congress *could* change it either expressly or by implication. But petitioners have offered no persuasive reason to think that Congress has done so here – and certainly none that could overcome the plain language of § 201(b).

3. Despite these clear grants of authority to the agency, petitioners rely on two provisions of § 332(c)(7) to argue that Congress affirmatively withheld from the FCC jurisdiction to interpret the substantive provisions of § 332(c)(7)(B)(i)(II) and (B)(ii). Neither provision creates any ambiguity that would require resort to *Chevron* or warrant this Court's review.

a. The Cities rely on § 332(c)(7)(A). *See* Cities Pet. 24. That subsection provides that, "[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). This is a savings clause; it says nothing about the Commission's jurisdiction to implement or interpret other parts of § 332, and it certainly does not withdraw the enabling power conferred by § 201(b). Further, its reference to restrictions of local authority "provided in this paragraph" reemphasizes that the substantive provisions of § 332(c)(7)(B) *do* "limit" state and local "authority."

A comparison to § 2(b) of the Act is instructive. Section 2(b) provides that, with certain exceptions, "nothing in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to"

certain matters that are reserved to the states. *Id.* § 152(b) (emphasis added). This language, on which the Court relied in *Louisiana PSC*, is a clear restriction on FCC jurisdiction of just the kind that petitioners contend is found in § 332(c)(7)(A). But the contrast between the language that Congress used in § 2(b) to restrict jurisdiction and the omission of any comparable language from § 332(c)(7)(A) is fatal to the Cities' argument. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration in original; internal quotation marks omitted); Pet. App. 42a & n.104.[13]

The Cities argue that "it is hard to imagine [§ 332(c)(7)(A)'s] purpose" if it does not restrict the Commission's jurisdiction. Cities Pet. 26. On the contrary, the natural reading of § 332(c)(7)(A) still provides protection for local zoning authority. When Congress enacted § 332(c)(7), the FCC was considering a petition by CTIA for an order broadly preempting local zoning processes as applied to wireless facilities, using its authority under *§ 332(c)(3)*, which prevents states from "regulat[ing] the entry of . . . any commercial mobile service or any private mobile

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[13] Recognizing this problem, the Cities assert in a footnote that "the logical reading of Section 332(c)(7) is that it is broader, not narrower[,] than" § 2(b). Cities Pet. 26 n.11. The assertion is unpersuasive. Section 2(b) explicitly limits *both* the "substantive reach" of the Communications Act, *Iowa Utils. Bd.*, 525 U.S. at 380, *and* the FCC's jurisdiction to enforce the Act. Section 332(c)(7)(A) limits the substantive reach of the Act (though not the provisions that the FCC actually construed here) and does not mention agency jurisdiction.

service." 47 U.S.C. § 332(c)(3)(A).[14] The FCC later cited § 332(c)(7)(A) in dismissing that petition.[15] Thus, the provision has meaningful effect when read as a savings clause that preserves some local zoning authority from preemption, subject to the restrictions in § 332(c)(7)(B) – but leaving intact the Commission's jurisdiction to interpret those restrictions, just as it can interpret any other provision of the Act.[16]

The Cities also argue that, if the FCC's general rulemaking authority applies to § 332(c)(7)(B), then § 332(c)(7)(B)(iv),[17] which gives specific preemptive

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[14] *See* CTIA's Petition for Rulemaking, *Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Services Providers*, RM-8577 (FCC filed Dec. 22, 1994).

[15] *See* Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, ¶ 116 & n.137 (1997).

[16] The same dispute – whether the FCC should preempt local zoning authority *entirely* – accounts for the conference committee's statement that "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities should be terminated." H.R. Conf. Rep. No. 104-458, at 208 (1996) ("Conf. Rep."), *reprinted in* 1996 U.S.C.C.A.N. 124, 222, *cited in* Cities Pet. 6, 28. Congress's desire to save local zoning authority as applied to wireless towers from total oblivion does not support petitioners' argument that Congress meant to prevent the FCC from issuing guidance concerning the restrictions that the 1996 Act itself put in place.

[17] Subsection (iv) states that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the

effect to FCC regulations concerning "the environmental effects of radio frequency emissions," is "surplusage." Cities Pet. 28. It is quite likely that the FCC *could* have, in its discretion, exercised such preemptive power without the specific language in § 332(c)(7)(B)(iv). But that does not render subsection (iv) surplusage: instead, the language expresses Congress's specific intent that the FCC's radio frequency emission regulations *would* have preemptive effect, taking the preemption decision away from the agency and making it a matter of statutory law.

b. CTC relies on § 332(c)(7)(B)(v). *See* CTC Pet. 19. That subsection creates a cause of action in federal or state court for any person "adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with" § 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(v). It also specifically authorizes a person "adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) [to] petition the Commission for relief." *Id.*

CTC argues that § 332(c)(7)(B)(v) reflects Congress's alleged intent to divide authority between the courts and the FCC, leaving the FCC jurisdiction only over claims that stem from a violation of subsection (iv). Section 332(c)(7)(B)(v), however, contains no language restricting the FCC's authority, which Congress could easily have inserted had it meant to do so.[18] More-

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Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

[18] Thus, the legislative history that CTC quotes in which a conference committee expressed "'the intent of the conferees that,'" with certain exceptions, "'the courts shall have exclusive jurisdiction over all . . . disputes arising under this section,'"

over, even if § 332(c)(7)(B)(v) is interpreted as a grant of exclusive judicial jurisdiction where it applies, it does not (and could not) convey to the courts the jurisdiction to issue general guidance in the form of a declaratory ruling. Instead, § 332(c)(7)(B)(v) deals only with procedures for resolving disputes about particular "act[s]," "final action[s]," or "failure[s] to act" – the types of disputes that make up concrete Article III cases and controversies. The FCC's declaratory ruling was not addressed to any such particular dispute.

In addition, CTC's argument closely parallels one that this Court rejected in *Iowa Utilities Board*. There, this Court held that, although "the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to rural [local exchange carriers]," these assignments did "not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments." 525 U.S. at 385 (citation omitted). Just so here: Congress's decision to give the courts the job of hearing complaints against local authorities does not logically preclude the FCC from providing guidance to the courts and to parties whose disputes have not yet ripened for judicial decision. *See also Alliance for Cmty. Media*, 529 F.3d at 775 (holding that "the availability of a judicial remedy" for "unreasonable" actions by state and local governments "does not foreclose the [FCC's] rulemaking authority").

c. Finally, both the Cities and CTC – as well as their *amici* – contend that principles of federalism

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CTC Pet. 26 (quoting Conf. Rep. 208), is not entitled to weight. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (explaining that "the authoritative statement is the statutory text, not the legislative history").

support restricting the FCC's jurisdiction here. *See* Cities Pet. 22-23, 31; CTC Pet. 26-28; NWRA et al. *Amici* Br. 25-26. These arguments fail because, as we have shown, the exercise of *federal* authority here is supported by the unambiguous (and uncontested) language of the Communications Act. The question of the extent to which that federal authority is to be exercised by an administrative, as opposed to a judicial, actor does not implicate any significant federalism concern.

Once again, petitioners' argument is contrary to *Iowa Utilities Board*, in which Justice Scalia's opinion for this Court rejected the notion that principles of federalism deserved weight in this Court's reasoning about the allocation of authority between the federal courts and the FCC:

> The appeals by [two partial dissents] to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate "States' rights" debate over that detail.

525 U.S. at 378 n.6. So too here. This is not a case about federalism. It is also not ultimately a case about *Chevron*, which at most gave the court of appeals added comfort about affirming the FCC's correct construction of the Communications Act. It

presents only a straightforward question of statutory interpretation that can and should be resolved in the FCC's favor without any deference being required. Nothing about that question warrants review by this Court.[19]

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[19] The third question presented in CTC's petition asks whether the FCC "usurp[ed] the jurisdiction and authority reserved for State and local governments by Congress . . . by creating additional limitations on state and local governments beyond those provided for in the statute." CTC Pet. i. Although CTC thus initially frames this question as jurisdictional, the corresponding arguments in the body of its petition appear to contend that the FCC's actions were contrary to statute or otherwise arbitrary and capricious. *See, e.g., id.* at 24-37. To the extent that CTC intends to raise such questions, they clearly do not warrant review. No division of the circuits is alleged, the question is specific to the facts of this case, and the court of appeals' decision is correct for the reasons expressed in that court's opinion.

Respectfully submitted,

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OPPOSITION BRIEF

Nos. 11-1545 and 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under 47 U.S.C. 332(c)(7)(B)(ii), a state or local government must act "within a reasonable period of time" on a request for authorization to construct or modify "personal wireless services facilities." The question presented is as follows:

Whether the Federal Communications Commission has authority to interpret the phrase "a reasonable period of time," as that term is used in Section 332(c)(7)(B)(ii), in order to guide federal courts when they resolve lawsuits brought under 47 U.S.C. 332(c)(7).

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a)[1] is reported at 668 F.3d 229. The order of the Federal Communications Commission (Pet. App. 69a-171a) is reported at 24 F.C.C.R. 13,994. The order of the Federal

[1] Unless otherwise specified, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 11-1545.

Communications Commission on reconsideration (Pet. App. 172a-195a) is reported at 25 F.C.C.R. 11,157.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2012. Petitions for rehearing were denied on March 29, 2012 (Pet. App. 196a-197a). The petitions for a writ of certiorari were filed on June 22, 2012, and June 27, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An effective national wireless telecommunications network requires the construction of cellular phone towers and antenna sites, but local residents sometimes resist the erection of such facilities in their communities. As a result, "zoning approval for new wireless facilities is both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 F.C.C.R. 10,785, 10,833 ¶ 90 (1997).

Congress has attempted to balance those competing federal and local concerns. As part of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. Congress enacted 47 U.S.C. 332(c)(7), which reflects a deliberate compromise between two competing aims: preserving the traditional role of state and local governments in regulating the siting of wireless telecommunications facilities, while facilitating the rapid deployment of wireless telephone service nationwide.

Section 332(c)(7) contains two parts. The first part, entitled "General authority," generally preserves the zoning authority of state and local governments "over decisions regarding the placement, construction, and modification of personal wireless service facilities" (such

as cell towers and transmitters) "[e]xcept as provided in this paragraph." 47 U.S.C. 332(c)(7)(A). The second part, entitled "Limitations," "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). For example, that part provides that regulations imposed by state and local governments may not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i).

In addition, to expedite the processing of wireless facility siting applications, Section 332(c)(7)(B)(ii) provides that a state or local government "shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. 332(c)(7)(B)(ii) (emphasis added). The statute does not define the phrase "reasonable period of time." If a state or local government does not act on a wireless facility siting request within such a period, however, any person "adversely affected by" the government's "failure to act * * * may, within 30 days after such * * * failure to act, commence an action in any court of competent jurisdiction," and the "court shall hear and decide such action on an expedited basis." 47 U.S.C. 332(c)(7)(B)(v). Although the 30-day period for seeking judicial review begins to run from the date on which the "failure to act" occurs, the statute does not specify when a "failure to act" takes place, nor does it otherwise define that term.

2. In July 2008, CTIA—The Wireless Association (CTIA), a trade association of wireless telephone service providers, filed a petition for a declaratory ruling with the Federal Communications Commission (FCC or Commission). CTIA Pet. for Declaratory Ruling, WT Docket No. 08-165 (filed July 11, 2008) (CTIA Pet.). In its petition, CTIA asked the Commission to clarify the meaning of "failure to act" in Section 332(c)(7)(B)(v). *Id.* at 17-27. CTIA pointed out that, because the statute "does not explain when a 'failure to act' accrues" under Section 332(c)(7)(B)(v), "such a failure" was often "impossible to pinpoint." *Id.* at 20. That statutory ambiguity created a dilemma for wireless service providers because a party that wishes to challenge a local government's "failure to act" must file suit "within 30 days after such * * * failure to act." 47 U.S.C. 332(c)(7)(B)(v). CTIA explained that, without knowing when a failure to act occurs, wireless carriers faced the choice of either "endur[ing] further delay" in the hope that government action will be forthcoming—"and possibly miss[ing] the 30-day window" to file suit—or "incur[ring] the substantial costs and additional time" associated with a lawsuit that may be dismissed as premature because "insufficient time has passed for the siting authority to have 'failed to act.'" CTIA Pet. 20 (brackets omitted).

3. The FCC's Wireless Telecommunications Bureau issued a public notice seeking comment on CTIA's petition. Public Notice, *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA*, 23 F.C.C.R. 12,198 (2008). After reviewing the resulting record, the FCC issued a declaratory ruling granting in part and denying in part the petition. Pet. App. 69a-171a.

As a threshold matter, the Commission determined that it had "the authority to interpret Section 332(c)(7)." Pet. App. 87a. The FCC noted that several sections of the Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*—specifically, Sections 1, 4(i), 201(b), and 303(r)—grant the Commission authority to interpret and implement the Act's provisions. Pet. App. 87a-88a (citing 47 U.S.C. 151, 154(i), 201(b), 303(r)). It concluded that "[t]hese grants of authority necessarily include * * * Section 332(c)(7)." *Id.* at 88a.

The Commission observed that "it is not clear from the Communications Act *what* is a reasonable period of time to act on an application" under Section 332(c)(7)(B)(ii) "or *when* a failure to act occurs" under Section 332(c)(7)(B)(v). Pet. App. 111a. The agency determined that "it is in the public interest to define the time period after which an aggrieved party can seek judicial redress for a State or local government's inaction." *Id.* at 97a. The interest in certainty was especially acute, the Commission explained, because the record before the agency revealed "a significant number of cases" of "unreasonable delays" in the wireless facility siting process. *Id.* at 98a. Such delays had "obstructed the provision of wireless services," *id.* at 100a, as well as "the deployment of advanced wireless communications services," *id.* at 102a, and public safety and emergency services like "wireless 911" service, *id.* at 105a.

To that end, the agency adopted presumptively reasonable processing deadlines that were "based on actual practice as shown in the record." Pet. App. 111a. The deadlines were designed to provide guidance to wireless providers, zoning authorities, and courts by "ensuring that the point at which a State or local authority 'fails to

act' is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress." *Ibid.*

The large majority of zoning authorities that participated in the proceeding before the agency stated that they processed applications for wireless collocation (*i.e.*, the modification or augmentation of existing wireless facilities) within 90 days, and other wireless siting requests (involving the construction of new facilities) within 150 days. Pet. App. 117a-120a. The Commission therefore found "90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations." *Id.* at 115a. The Commission made clear that, although the 90- and 150-day timeframes established by the declaratory ruling were "presumptively" reasonable, *id.* at 97a, state and local governments would "have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable," *id.* at 112a. The Commission created rebuttable presumptions because it recognized that "certain cases may legitimately require more processing time," *id.* at 107a, and that "courts should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications," *id.* at 108a-109a.

The Commission also allowed for "further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases." Pet. App. 112a. For example, the timeframes "may be extended" in any case "by mutual consent of the * * * wireless service provider and the State or local government," and any such extension will toll "the commencement of the 30-day pe-

riod for filing suit" under Section 332(c)(7)(B)(v). *Id.* at 120a. In addition, when an applicant fails to submit a complete application, "the time it takes for [the] applicant to respond to a [zoning authority's] request for additional information will not count toward" the presumptive processing timeframe, so long as the authority "notifies the applicant within the first 30 days that its application is incomplete." *Id.* at 124a.

4. The FCC denied petitions for reconsideration. Pet. App. 172a-195a.

5. The court of appeals denied a petition for review. Pet. App. 1a-68a. As relevant here, the court applied the test prescribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), and determined that the Commission had reasonably construed the scope of its authority to interpret Section 332(c)(7)(B). Pet. App. 34a-51a.

The court of appeals explained that nothing in the Communications Act "unambiguously preclude[s] the FCC from establishing the 90- and 150-day time frames" for processing tower siting applications. Pet. App. 41a. In reaching that conclusion, the court rejected the suggestion that Section 332(c)(7)(A) bars the Commission from interpreting the limitations contained in Section 332(c)(7)(B). While recognizing that Section 332(c)(7)(A) "certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)," the court observed that Section 332(c)(7)(A) is silent as to "[w]hether the FCC retains the power" to interpret and implement the limitations expressly imposed by Section 332(c)(7)(B). *Id.* at 41a. "Had Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction," the court reasoned, "one would expect it to have done so

explicitly because Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC." *Id.* at 41a-42a. As the court construed the statute, however, Section 332(c)(7)(A) "did not clearly remove the FCC's ability to implement the limitations set forth in [Section] 332(c)(7)(B)." *Id.* at 42a.

Likewise, the court of appeals found nothing in Section 332(c)(7)(B)(v), the statute's judicial-review provision, that clearly prohibits the FCC from interpreting the restrictions imposed by Section 332(c)(7)(B)(ii). The court reasoned that "[a]lthough [Section] 332(c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under [Section] 332(c)(7)(B)(ii)," it "does not address the FCC's power * * * to issue an interpretation of [Section] 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision." Pet. App. 42a-43a. Citing the Sixth Circuit's decision in *Alliance for Community Media* v. *FCC*, 529 F.3d 763, 776 (2008), cert. denied, 129 S. Ct. 2821 (2009), the court concluded that "there is nothing inherently unreasonable about reading [Section] 332(c)(7) as preserving the FCC's ability to implement [Section] 332(c)(7)(B)(ii) while providing for judicial review of disputes under [Section] 332(c)(7)(B)(ii)." Pet. App. 44a.

The court of appeals then examined whether the 90- and 150-day time frames adopted by the agency reflected a permissible interpretation of the statute. Holding that the statutory phrases "reasonable period of time" and "failure to act" were "ambiguous and subject to FCC interpretation," Pet. App. 52a-53a, the court concluded that "the FCC's 90- and 150-day time frames are based on a permissible construction" of the statute "and are thus entitled to *Chevron* deference." *Id.* at 54a.

ARGUMENT

Petitioners assert (Pet. 13-16; 11-1547 Pet. 11-14) that the decision below contributes to a conflict among the circuits on whether the rule of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), applies to an agency's interpretation of a statute that defines the agency's authority. Although there is some disagreement among the courts of appeals on that issue, that abstract question is not presented by this case. Nor is there merit to petitioners' suggestion (Pet. 30-32; 11-1547 Pet. 24-37) that the FCC ruling at issue here creates significant federal interference with the zoning authority of state and local governments. Congress, not the FCC, established federal standards and limitations governing local zoning authority over wireless communications facilities. The court of appeals correctly held that the FCC has authority to interpret 47 U.S.C. 332(c)(7)(B), and it correctly upheld the agency's interpretation of that provision. Its decision upholding the FCC's ruling does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld the FCC's interpretation of Section 332(c)(7)(B). That provision requires state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed," but it does not define the phrase "reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). The FCC reasonably interpreted that phrase by adopting presumptions, based on the actual experience of state and local governments, regarding the periods of time that will be considered reasonable. Pet. App. 111a.

As the agency charged with administration of the Communications Act, the FCC has authority to interpret the Act's ambiguous provisions, including Section 332(c)(7). Several sections of the Communications Act confirm the agency's broad authority to do so. For example, 47 U.S.C. 151 directs the Commission to "execute and enforce the provisions of this [Act]." Section 201(b) empowers the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. 201(b); see 47 U.S.C. 154(i) (authorizing the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions"). And Section 303(r) authorizes the agency to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]." 47 U.S.C. 303(r). Citing those provisions in this case, the Commission correctly determined that it "has the authority to interpret Section 332(c)(7)." Pet. App. 87a. The court of appeals, in turn, correctly applied *Chevron* in upholding both that determination and the Commission's interpretation of Section 332(c)(7) itself.

2. Petitioners contend (Pet. 13-21; 11-1547 Pet. 11-15) that this Court should grant review to resolve a conflict among the courts of appeals as to whether courts should apply *Chevron* when examining an agency's interpretation of the scope of its own statutory authority. They note that while the court below "appl[ies] *Chevron* to an agency's interpretation of its own statutory jurisdiction," other "courts of appeals have adopted different approaches to the issue." Pet. 13-14 (quoting Pet. App. 36a-37a). In particular, the Seventh and Federal Cir-

cuits review de novo an agency's determination of the scope of its authority. See *Durable Mfg. Co.* v. *United States Dep't of Labor*, 578 F.3d 497, 501 (7th Cir. 2009); *Bolton* v. *MSPB*, 154 F.3d 1313, 1316 (Fed. Cir. 1998), cert. denied, 526 U.S. 1088 (1999).

a. The decision below does not create a direct conflict with the Seventh and Federal Circuit cases cited by petitioners. Unlike in those cases, the statutory interpretation at issue here does not implicate the agency's jurisdiction to make rules or adjudicate particular disputes. It merely permits the FCC to offer guidance to the courts, which remain the ultimate arbiters of disputes over whether state or local governments have addressed wireless siting applications "within a reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). In that respect, this case is similar to *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), in which this Court held that even though Congress had directed state commissions to resolve interconnection disputes arising under Section 252 of the Communications Act, the FCC could nevertheless exercise its general rulemaking authority under 47 U.S.C. 201(b) "to guide the state-commission judgments" made under Section 252. *Id.* at 385.

b. In any event, the issue raised by petitioners is not properly presented by this case because petitioners assert here (as they did below) that the "plain language" of Section 332(c)(7)(A) precludes the FCC from interpreting the provisions of Section 332(c)(7)(B). Indeed, the crux of petitioners' argument is that the court of appeals erred in identifying any ambiguity in Section 332(c)(7). See, *e.g.*, Pet. 24-25 (arguing that "the plain language" of Section 332(c)(7)(A) "is clear," and that "[t]he FCC's reading cannot be squared with [Section] 332(c)(7)(A)'s plain language"); see also 11-1547 Pet. 16-24. If peti-

tioners were correct, it would therefore make no difference whether the court of appeals applied *Chevron* or conducted de novo review: under either standard of review, the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

Thus, although dressed in the garb of a general question of administrative law—whether *Chevron* applies to an agency's interpretation of its own statutory authority—petitioners' real argument is simply that the FCC and the court of appeals misinterpreted Section 332(c)(7). That issue is not the subject of any circuit conflict, and it does not warrant this Court's review. Even if the issue did warrant review, it would be more appropriate for the Court to consider it in a case—unlike this one—involving the application to a concrete set of facts of the time limits set out in the FCC's ruling.

c. In any event, even if the court of appeals had engaged in de novo review, there is no reason to believe that the court would have reached a different conclusion about the Commission's authority. As noted, Section 201(b) authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. 201(b). This Court has held that the authority granted by Section 201(b) extends to provisions of the 1996 Act (such as 47 U.S.C. 332(c)(7)) because those provisions were "inserted into the Communications Act." *AT&T*, 525 U.S. at 377. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) (upholding an FCC declaratory ruling that interpreted ambiguous provisions of the Communications Act). Citing *AT&T*, the court of appeals correctly reasoned that "Congress surely recognized that it was legislating against the

background of the Communications Act's general grant of rulemaking authority to the FCC." Pet. App. 41a-42a. That "general grant of authority would ordinarily extend to amendments to the Communications Act, like [Section] 332(c)(7)(B)'s limitations, in the absence of specific statutory limitations on that authority." *Id.* at 42a.

Petitioners maintain that Section 332(c)(7)(A) specifically limits the FCC's authority to interpret the restrictions established by Section 332(c)(7)(B). Pet. 24. As the court of appeals pointed out, however, Section 332(c)(7)(A) merely "prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a. It says nothing about the FCC's authority to interpret the limitations imposed by Section 332(c)(7)(B). "Had Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly." *Ibid.* "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," *AT&T*, 525 U.S. at 397, and as the court of appeals observed, "Congress certainly knew how to specifically restrict the FCC's general authority over the Communications Act as it clearly restricted the FCC's ability to use that authority in other contexts." Pet. App. 42a (citing 47 U.S.C. 152(b), which explicitly denies the FCC jurisdiction over "intrastate" communications service).

Petitioners' reliance (Pet. 25-26) on *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355 (1986), is misplaced. In *Louisiana Public Service Commission*, the Court held that 47 U.S.C. 152(b) barred the FCC from preempting certain intrastate telecommunications regulations. 476 U.S. at 370-376. The Court based that deci-

sion on "the express jurisdictional limitations on FCC power contained in" Section 152(b). *Id.* at 370. With limited exceptions, Section 152(b) provides that "nothing in this [Act] shall be construed to apply or *to give the Commission jurisdiction* with respect to" certain matters concerning intrastate communication service. 47 U.S.C. 152(b) (emphasis added). By contrast, no provision of the Act expressly limits the Commission's authority to interpret Section 332(c)(7)(B). And as this Court has recognized, "Commission jurisdiction always follows where the Act applies." *AT&T*, 525 U.S. at 380. That is true even when the Act applies to matters that the FCC does not typically regulate, such as intrastate telecommunications or local zoning authority. See, *e.g.*, *id.* at 378 n.6 (notwithstanding the traditional practice of allowing the States to regulate intrastate telecommunications, the 1996 Act "unquestionably" has "taken" certain aspects of "the regulation of local telecommunications competition away from the States").

Petitioners argue that Section 332(c)(7)(A), like Section 152(b), clearly limits the FCC's interpretive authority. Pet. 26. To the contrary, Section 332(c)(7)(A)—unlike Section 152(b)—makes no mention of the FCC or its jurisdiction. It simply states: "Except as provided in [Section 332(c)(7)], nothing in this [Act] shall limit or affect" state or local authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). The court of appeals correctly read that provision to "prohibit[] the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a. In other words, Section 332(c)(7)(A) bars the agency from construing the text of provisions of the Act outside of Section 332(c)(7) to im-

pose substantive restrictions on state or local regulation of wireless facility siting.[2] Thus, contrary to petitioners' assertion (Pet. 26), Section 332(c)(7)(A) imposes substantial limits on the FCC's authority even if it is not read to "fence off" the interpretation of Section 332(c)(7)(B).

None of the other "interpretive tools" cited by petitioners (Pet. 27-29) demonstrates that Congress clearly intended to prevent the FCC from interpreting Section 332(c)(7). Although the Conference Report on Section 332(c)(7) stated that the FCC should terminate any pending rulemaking regarding preemption of state or local tower siting authority, see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996), petitioners have pointed to nothing in the legislative history that "indicate[s] a clear intent to bar FCC implementation of the limitations" established by Section 332(c)(7)(B) once the statute was enacted. Pet. App. 48a.

There also is no merit to petitioners' claim (Pet. 28) that the FCC's reading of the statute renders "superfluous" Section 332(c)(7)(B)(v)'s "specific grant of authority to the FCC to address [radio frequency (RF) emission] issues." Section 332(c)(7)(B)(v) distinguishes between disputes involving RF emissions (which the Commission may review) and disputes involving all other issues arising under Section 332(c)(7)(B) (which the courts have exclusive jurisdiction to review). That distinction re-

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[2] For example, although Section 253 of the Communications Act generally authorizes the FCC to preempt state or local regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," 47 U.S.C. 253(a), Section 332(c)(7)(A) precludes the Commission from construing Section 253 to preempt state or local regulation of the construction of wireless communications facilities.

mains relevant under the FCC's reading of the statute. Although the Commission used its general authority to assist the courts by interpreting and clarifying certain provisions of the Communications Act relating to disputes that are subject to court review, the agency recognized that Congress gave the courts exclusive jurisdiction to resolve individual disputes under Section 332(c)(7)(B) that do not concern RF emissions. See, *e.g.*, Pet. App. 108a. In other words, courts have the final say in lawsuits filed under Section 332(c)(7).

Contrary to petitioners' assertion (Pet. 29), the Fifth Circuit's statutory analysis did not ignore the "presumption against preemption." *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 77 (2008). Rather, the court of appeals held that the presumption did not apply here because Section 332(c)(7)(B) clearly "indicated a preference for federal preemption of state and local laws governing the time frames for wireless zoning decisions." Pet. App. 49a; see *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) (*Rancho Palos Verdes*) (Section 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities"). The court of appeals correctly recognized that Congress has established federal standards to govern the exercise of state and local zoning authority over wireless service facilities. In view of those federal standards, the court correctly rejected the suggestion that the FCC's declaratory ruling improperly infringed on state or local authority. See *AT&T*, 525 U.S. at 378 n.6 (the presumption against preemption does not apply when Congress has created a "*federal* regime" governing the regulation of local telecommunications competition).

Finally, petitioners identify no plausible reason that Congress would have excepted Section 332(c)(7)(B) from the Commission's general authority to construe ambiguous provisions of the Communications Act. Based on its pre-existing expertise and on the information it acquired through the notice-and-comment process, the FCC was clearly better-positioned than any court to determine what period of time is generally "reasonable" for acting on the pertinent applications. By identifying periods of time for acting that the expert agency views as presumptively reasonable, and by bringing greater consistency and predictability to judicial interpretations of the "reasonable period of time" standard, the declaratory ruling should serve the interests of applicants, regulators, and courts alike. The Commission's issuance of the declaratory ruling thus serves precisely the interests that the agency's gap-filling authority under the Communications Act is generally intended to further. If the agency were disabled from construing Section 332(c)(7)(B), by contrast, each court adjudicating a suit brought under Section 332(c)(7)(B)(v) would be required either to assess the defendant's "reasonableness" without reference to the practices that generally prevail in this context, or to attempt to replicate the inquiry that the FCC in fact conducted. There is no evident reason that Congress would have preferred either of those approaches to the one that the Commission adopted.

3. Petitioners assert (Pet. 30-32; 11-1547 Pet. 24-37) that this case warrants the Court's review because it concerns important issues involving federal infringement of state and local zoning authority. That argument lacks merit.

Contrary to petitioners' suggestion (Pet. 23), the FCC's declaratory ruling did not adopt "a federal zoning

policy." It simply established presumptively reasonable timeframes for processing wireless facility siting applications. As the court of appeals correctly understood, those timeframes "are not hard and fast rules but instead exist to guide courts in their consideration of cases challenging state or local government inaction." Pet. App. 62a. Ultimately, the courts, not the Commission, will resolve issues of timing in lawsuits brought under Section 332(c)(7).

Petitioners argue (11-1547 Pet. 25) that, as a result of the declaratory ruling, state and local officials "must act within a *definite* time frame or be found to have failed to act at all." That is incorrect. The court of appeals noted that the declaratory ruling did not create "a scheme in which a state or local government's failure to meet the FCC's time frames constitutes a *per se* violation of [Section] 332(c)(7)(B)(ii)." Pet. App. 62a. To the contrary, "under the regime" adopted in the declaratory ruling, state and local officials "will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Id.* at 112a; see *id.* at 62a-63a (noting "a variety of circumstances" that might serve to rebut the presumption and justify a longer period for processing a particular application). The ruling also gives state and local authorities the flexibility to negotiate alternative timeframes to accommodate their particular circumstances. See *id.* at 120a. That sort of accommodation should reduce the alleged litigation burdens and costs that form the crux of petitioners' objections to the declaratory ruling. See Pet. 23, 31.

Petitioners contend (Pet. 31) that the declaratory ruling's impact on state and local governments involves some of the same "factors" that led this Court to con-

clude in *Rancho Palos Verdes* that "a [Section] 1983 remedy was inconsistent with [Section] 332(c)(7)'s statutory scheme." To the contrary, *Rancho Palos Verdes* concerned a very different question: whether a party could seek a remedy under 42 U.S.C. 1983 for an alleged violation of 47 U.S.C. 332(c)(7)(B). The Court there held that Congress—"by providing a judicial remedy different from [Section] 1983 in [Section] 332(c)(7) itself—precluded resort to [Section] 1983." 544 U.S. at 127. In this case, by contrast, the FCC's declaratory ruling is rooted in the language of Section 332(c)(7) itself.

There is no basis for petitioners' assertion (11-1547 Pet. 35) that the declaratory ruling gives applicants an incentive "to run out the clock in order to get tower siting approval." The FCC has not mandated approval of an application if a state or local government fails to act by a certain date. Indeed, the Commission specifically rejected CTIA's proposal that the agency "deem an application granted" if a zoning authority failed to act within the FCC's prescribed timeframe. Pet. App. 108a. Instead, the Commission emphasized that the courts would have the discretion "to fashion appropriate case-specific remedies" based on "the specific facts of individual applications." *Id.* at 108a-109a. Evidence of an applicant's dilatory behavior would also be relevant to a court's determination whether the presumptively reasonable period identified in the declaratory ruling was reasonable in the particular case. Wireless siting applicants would therefore have no good reason to drag out the application process.

Nor can petitioners plausibly claim (11-1547 Pet. 35) that the declaratory ruling "has the effect of giving preferential treatment to telecommunications providers." As the court of appeals correctly noted, "nothing

in the FCC's time frames necessarily requires state and local governments to provide greater preference to wireless zoning applications than is already required by [Section] 332(c)(7)(B)(ii) itself." Pet. App. 61a. The statutory directive that state and local governments act on such applications within a reasonable period of time reflects Congress's decision to prioritize the processing of wireless siting applications "because other types of state and local zoning decisions are not subject to such a standard." *Ibid.* Furthermore, reviewing courts are directed to "hear and decide" lawsuits brought under the statute "on an expedited basis." 47 U.S.C. 332(c)(7)(B)(v). Hence, it is Congress—not the FCC—that has established priority treatment for wireless siting disputes. The declaratory ruling does nothing more than implement that statutory preference.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

RECORD AND BRIEFS

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CITY OF ARLINGTON, TEXAS; CITY OF LOS ANGELES, CALIFORNIA; COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; COUNTY OF SAN DIEGO, CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,

Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Neither the government nor CTIA-The Wireless Association and Cellco Partnership d/b/a Verizon Wireless (collectively, "CTIA") doubt that the question of whether *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), applies to an agency's determination of its own jurisdiction merits review. Respondents ask only that the Court wait for a better case, but they offer no persuasive reason for the Court to do so. This case presents the issue squarely, in the context of an important dispute about the relationship between the FCC and State and local governments. The Court should grant the petition.

I. Respondents Acknowledge That the Courts Are Divided on Whether *Chevron* Applies to an Agency's Jurisdictional Determinations.

We begin where Petitioners and Respondents agree—but where the lower courts do not. On the question of whether *Chevron* applies to an agency's jurisdictional determinations, Respondents acknowledge what the court below stated plainly: this Court "has not conclusively resolved" the question and lower courts "have adopted different approaches" to it. App. 37a; *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 765-66 (1999) (acknowledging but declining to decide the question). Respondents do not doubt the circuit split, call for its further development, or question its importance. Rather, the government finds "disagreement among the courts of appeals," and CTIA states that the question "may well war-

rant this Court's review." Government Brief in Opposition ("Opp.") 9; CTIA/Verizon Brief in Opposition ("CTIA Opp.") 13.

This "most important—and vexing—question involving *Chevron*'s domain" does warrant review:[1] each time that Congress defines an agency's jurisdiction imprecisely, it starts parties on a path to litigation under a standard of review set by chance. The Court should standardize the courts' approaches to this important and recurring issue.

II. This Case Squarely Presents the Question.

Respondents offer no persuasive reason to wait for another case to resolve this pressing conflict.

1. CTIA suggests that the *Chevron* question was not important to the Fifth Circuit's decision, asserting that the jurisdictional issue is not "sufficiently close" for *Chevron* to be "relevant." CTIA Opp. 14. But the decision demonstrates that *Chevron* was not only relevant, but central. The court found the jurisdictional question ambiguous, that is, "susceptible to more than one reasonable interpretation," (App. 39a) not once,

- "This is a question to which § 332(c)(7)(A) itself does not provide a clear answer." App. 41a.

twice,

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[1] Thomas W. Merrill, *Chevron's Domain*, 89 Geo. L.J. 833, 909 (2001).

- "Whether the FCC retains the power of implementing those limitations . . . remains unresolved." *Id.*

three times,

- "Congressional silence leaves § 332(c)(7)(A)'s effect on the FCC's authority to administer § 332(c)(7)(B)'s limitations ambiguous." App. 42a.

or four,

- "[T]he statute is silent on the question of whether the FCC can use its general authority under the Communications Act to implement § 332(c)(7)(B)'s limitations." App. 45a.

but at least *nine* times.[2]

The court then abandoned its search for the statute's best reading: it ruled that if the FCC offered any "permissible" construction of its jurisdiction, it "must defer." App. 45a. The case thus squarely presents the question of whether this deference was appropriate.[3]

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[2] App. 41a ("neither § 332(c)(7)(A) nor § 332(c)(7)(B)(v) unambiguously preclude the FCC from establishing the 90- and 150-day time frames"); App. 41a (referring to "Congress's silence on this point"); App. 42a ("Congress did not clearly remove the FCC's ability to implement the limitations"); App. 42a (judicial cause of action "does not resolve § 332(c)(7)(A)'s ambiguity"); App. 44a ("§ 332(c)(7) is ambiguous"); App. 45a ("the statute is silent on the question").

[3] The government's claim that the issue is not properly presented because Petitioners assert that they should prevail

2. The government suggests that the decision "does not create a direct conflict with the Seventh and Federal Circuit cases cited" because "the statutory interpretation at issue here does not implicate the agency's jurisdiction to make rules or adjudicate particular disputes," but merely affects the FCC's authority to "provide guidance to the courts." Opp. 11. This is a distinction without a difference.

The government offers no reason to believe that the Seventh and Federal Circuits would reverse course and defer to the FCC's jurisdictional determination simply because the FCC expressed the determination in a declaratory order instead of a regulation. Rulings and regulations no less than declaratory orders provide "guidance" to the courts, which as the FCC notes, remain the "ultimate arbiters of disputes" even where *Chevron* applies. Opp. 11. The question here does not concern the guidance's format, but whether a court should defer to an agency's determination that it has jurisdiction to issue it. The Fifth Circuit answered "yes"; other courts would answer "no."

Of course, the case would be different if by "guidance" the FCC meant that it did not intend to speak with the force of law. But that is not what the agency said. Applying the statutes that grant it rulemaking

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under *Chevron*'s first step is meritless. Opp. 11-12. The Fifth Circuit rejected that argument and instead applied *Chevron* to determine whether the FCC's interpretation of its own jurisdiction was permissible. Nothing prevents this Court from reviewing that holding and resolving the acknowledged circuit conflict.

authority,[4] the FCC "prescribe[d] . . . rules and regulations" to "interpret and implement" §332(c)(7) (Opp. 6); and instructed that State and local governments must comply with the statute "as defined herein." App. 91a. Neither the FCC nor the Fifth Circuit indicated that the rules are not binding.[5] And if they had, that would be grounds for summary reversal, as *Chevron* deference is not owed interpretative rules. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *cf.* CTIA Opp. 15 (wrongly arguing that government's abandoned argument that declaratory ruling was interpretive rule is an alternative ground for *affirmance*).

III. Under a De Novo Standard, the Case Would Be Resolved in Petitioners' Favor.

Respondents also argue that "even if the court of appeals had engaged in de novo review, there is no reason to believe that the court would have reached a different conclusion about the Commission's authority." Opp. 12; *see also* CTIA Opp. 14. Of course, since the Fifth Circuit only asked if the FCC's reading was "permissible," this is mere speculation and provides no reason to forgo an opportunity to resolve an acknowledged and important circuit conflict. It is also wrong. A court seeking the best interpretation

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[4] 47 U.S.C. §§151, 154(i), 201(b), 303(r).

[5] The government suggests that the Court should wait for a case applying the FCC's rules to a "concrete set of facts" (Opp. 12) but offers no reason why facts would illuminate the purely legal questions the Petition presents.

would rule that the FCC lacks general policymaking authority here.

1. To begin, Respondents' assertion that they would prevail even under the proper standard does not preclude the Court from establishing that standard. As the Solicitor General has explained elsewhere, "the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." *Astrue v. Capato,* No. 11-159, U.S. Cert. Reply 11. That is, in fact, exactly what this Court did in *United States v. Mead Corp.*, 533 U.S. 218, 238-39 (2001): it clarified the Court's *Chevron* jurisprudence, rejected the government's claim to *Chevron* deference for tariff classification rulings, and remanded to the lower court to reconsider its ruling in light of the appropriate standard.

2. In any event, under a de novo standard, Respondents' defense of the FCC's jurisdictional determination would fail.

To start, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), does not settle the issue, but frames it. Although Respondents make much of the Court's statements that the FCC had authority to implement §§251 and 252 because these provisions were "inserted into the Communications Act," (Opp. 12), neither argues that Congress's mere placement of §332(c)(7) empowers the FCC to implement the section if Congress has demonstrated otherwise. Opp. 13; CTIA Opp. 17-18. Nor could they. *AT&T* does not establish a hard and fast rule requiring a court to find FCC jurisdiction, regardless of Con-

gress's intent. Rather, *AT&T* confirms that the FCC lacks jurisdiction when relevant "statutory provisions . . . displace the Commission's general rulemaking authority." 525 U.S. at 385.

3. Respondents argue that there is no displacement: State and local zoning is subject to national policy crafted by the FCC. Petitioners in turn maintain that Congress left § 332(c)(7)'s implementation to the courts through case-by-case adjudications that defer to the expert judgment of State and local zoning officials, not to a uniform national standard developed in Washington, D.C. Section 332(c)(7)'s text, structure, purposes, and history confirm Petitioners' view.

a. Congress considered the model the FCC now proposes—and specifically rejected it. The House passed a bill to "ensure" State or local government action "within a reasonable period of time" by authorizing the FCC to "prescribe and make effective a policy" in this area. H.R. Rep. No. 104-204, 1996 U.S.C.C.A.N. 10, 25 (1995), App. 212a. In conference, Congress completely re-wrote the provision. The conferees changed its title from "Facilities siting policies" to "Preservation of local zoning authority." They considered the language empowering the FCC to "prescribe and make effective" policy—and deleted it. And they replaced it with a broadly-worded preservation clause that not only assigns the FCC *no* general policymaking role,[6] but that also shields

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[6] The FCC's only policymaking role appears outside the preservation clause: the Commission may regulate and adjudicate

State and local authority from *any* "limit" or "[e]ffect" caused by *any* other provision of the Act. Accompanying the change, a conference report describes § 332(c)(7) as establishing "limitations" on the FCC's "role and powers." App. 209a-211a. The report directs the FCC to "terminate[ ]" its pending rulemaking, a direction unnecessary if Congress expected the FCC to "implement" the statute.[7] *Id.*

b. The government's central assertion is that the FCC has simply engaged in the ordinary exercise of expertise to clarify an ambiguous statutory phrase. This assertion, however, ignores that §332(c)(7) is designed to require courts to evaluate challenged delays on a case-by-case basis, taking into account local conditions and giving deference not to uniform national standards developed by the FCC, but to the expertise of local zoning officials.

That, in fact, is how the statute operated during the nearly two decades since the law was passed. As one court put it, the statute operates as an "experiment in federalism": it does not offer "a single 'cookie cutter' solution for diverse local situations" and "produce[s] (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and interests of particular communities." *Town of Amherst v. Omnipoint Communs. Enters.*,

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radio frequency emissions matters. 47 U.S.C. §332(c)(7)(B)(iv), (v).

[7] Thus, read in context, the statute *does* "indicate a clear intent to bar FCC implementation." Opp. 15; *contra also* CTIA Opp. 20 n.16.

Inc., 173 F.3d 9, 17 (1st Cir. 1999); *see also N.Y. SMSA Ltd. P'shp v. Town of Riverhead Town Bd.*, 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000); *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190, 198 (D.R.I. 2000). By contrast, to defend its reading that Congress intended it to implement the law by adopting national standards, the government submits that a court faced with a zoning dispute must "replicate the inquiry that the FCC . . . conducted" of national zoning trends. Opp. 17. We are not aware of any court that has found this necessary in light of §332(c)(7)'s structure and purpose.

The government claims that there is "no plausible reason" that Congress would withhold FCC policy-making authority here. Opp. 17. But the FCC itself has acknowledged that it has "traditionally has been reluctant to become embroiled in zoning matters, believing that such issues are within the province of, and best resolved by, local land use authorities." *In re Artichoke Broad. Co.*, 10 FCC Rcd. 12631, 12633 (1995). Congress plainly took the same view. The conference report thus directed courts to apply the time limits in the statute not by looking to the FCC for guidance, but by examining the "usual period" established by State and local zoning experts:

> If a request . . . involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject

> their requests to any but the generally applicable time frames for zoning decision.

H.R. Rep. No. 104-458, at 207-208 (1996), App. 210a. The statute's main purpose is not to establish national timing standards but to prevent discrimination against national carriers.

c. To secure this purpose. Congress enacted a broad preservation clause providing that other than §332(c)(7)(B)'s "provided" language, "nothing in this Act shall limit or affect" State and local authority. 47 U.S.C. §332(c)(7)(A). Respondents are adamant that "nothing" means "something": the provisions that give the FCC the authority to make policy.[8] Opp. 13-15; CTIA Opp. 18. Petitioners, by contrast, give full effect to "nothing in this Act": it shields State and local authority from *any* "limit" or "[e]ffect" caused by *any* other provision of the Act, including those granting the FCC policymaking authority.

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[8] Respondents never explain why Congress would have required the FCC to speak with the force of law on issues that were to be determined based on local facts and circumstances. The FCC's only policymaking role appears outside the preservation clause: the Commission may regulate and adjudicate radio frequency emissions matters. 47 U.S.C. §332(c)(7)(B)(iv), (v). The government suggests that it needs to set national time limits to avoid potential statute of limitations issues where a "failure to act" is at issue, but the FCC can cite no case where a dispute has arisen as to how to apply the statute of limitations where a "failure to act" is alleged.

To be sure, §332(c)(7)(B) itself did "limit" and "affect" State and local authority. But after the Declaratory Ruling, State and local authority is "affect[ed]" differently. A reviewing court does not merely apply §332(c)(7)(B)'s reasonableness test in light of the conference report and local facts. Instead, the court now evaluates local action against a federal, administrative policy: one that takes an average of review times in certain jurisdictions, and then shifts the burden to State and local governments after they expire. What caused this new "effect?" The FCC tells us: its use of four other provisions "in this Act." App. 87a-88a.

d. Respondents' views create tensions and inconsistencies within §332(c)(7). Respondents, for example, disagree that the FCC's broad view of its authority renders §332(c)(7)(B)(iv)'s specific grant of authority to address RF matters surplusage. Opp. 15; CTIA Opp. 21. CTIA speculates that this specific grant of authority serves the distinct purpose of withdrawing agency discretion. Opp. 21. CTIA does not explain why this would be a concern. The better view is that without this specific grant, the FCC could not address the issue. More importantly, the inconsistencies all point in a single direction—absence of FCC jurisdiction—while Respondents offer nothing other than the fact that § 332(c)(7) appears in the Act to suggest that Congress meant for the FCC to create national zoning rules.

4. Respondents claim that Congress did not displace the FCC's authority because, unlike the statute at issue in *Louisiana PSC v. FCC*, 476 U.S. 355, 370 (1986), §332(c)(7)(A) does not use the word

"jurisdiction." Opp. 14; CTIA Opp. 18-19. But this is not about magic words. As the Court explained in *AT&T*, the FCC's authority over a section added to the Act does not derive from Congress's utterance of "jurisdiction," 525 U.S. at 380-381, but from Congress's placement of the section within the operative reach of the FCC's general rulemaking authority. 525 U.S. at 380-381.[9] Since Congress expands the FCC's jurisdiction in this way, it likewise demonstrates the absence of FCC authority by stating that the FCC's general powers cannot so much as "affect" a new section's subject matter.

5. Finally, Respondents' claims that "[t]his is not a case about federalism" (CTIA Opp. 22-24) and that the court properly elected not to consider the presumption against preemption (Opp. 16) miss § 332(c)(7)'s central purpose. The government asserts that the Fifth Circuit correctly determined that the presumption did not apply because Congress "indicated a preference for federal preemption of state and local laws governing . . . time frames." *Id.* But, as we have shown, this is precisely what §332(c)(7)(B)(ii) did *not* do. Congress sought not to preempt State and local timeframes, but to ensure that State and local governments heeded them. Here, however, the FCC openly acknowledges that its new rules do not accommodate all State laws. Pet. 9. In short, because the FCC has changed Con-

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[9] The Court explained that the word "jurisdiction" in §2(b), 47 U.S.C. §152(b), operates to prevent the FCC from exercising "ancillary" authority, which the agency has not claimed here. *Id.*

gress's regime of deference to State and local government policy to one of deference to its own, this case indeed presents an important federalism issue.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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September 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1545

In The
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, SAN LUIS & DELTA MENDOTA WATER AUTHORITY, AND WESTLANDS WATER DISTRICT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amicus Natural Water Resources Association ("NWRA") is a nonprofit, voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the western states. NWRA has member associations in Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington.

Amicus Association of California Water Agencies ("ACWA") represents approximately 90% of the public water agencies in California, which agencies are responsible for distributing water supplies for urban and agricultural use in California. Many ACWA members, in order to provide water supplies for their customers, have contracts with federal and state agencies entitling them to water deliveries from federal and state water projects.

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[1] Counsel of record for the parties to this petition have received notice of intent to file this *amicus curiae* brief at least 10 days prior to the due date of the brief (Rule 37.2). The petitioners and respondents have consented to the filing of this brief. None of the parties to the petition nor their counsel have authored the brief in whole or in part, and no such party or counsel made a monetary contribution to fund the preparation or submission of the brief (Rule 37.6).

Amicus San Luis & Delta-Mendota Water Authority ("SLDMWA") is a California joint powers authority, comprised of 29 member water agencies, which meet the water supply needs of over 2.8 million acres of agricultural lands within areas of Fresno, Kings, Merced, San Benito, San Joaquin, Santa Clara, and Stanislaus Counties; municipal and industrial use for more than 1 million people in the Silicon Valley as well as cities in the San Joaquin Valley, and for approximately 51,500 acres of private waterfowl habitat in the San Joaquin Valley, California.

Amicus Westlands Water District ("WWD"), located in Fresno and King Counties in California, is the nation's largest agricultural water district in terms of irrigated acreage. Westlands supplies irrigation water to California's Central Valley farmlands which produce a substantial portion of the fruits and vegetables grown and consumed in the nation.

The *amici* or their members obtain water supplies by diverting water from various water bodies, or by entering into contracts with federal and state agencies for delivery of water supplies from federal or state water projects. The U.S. Environmental Protection Agency ("EPA") has taken the position that it may require water users, including the federal and state water projects, to reduce water diversions and deliveries in order to provide additional supplies for endangered species under the Endangered Species Act ("ESA"). Thus, the *amici* have an interest in the issue presented in this case, which is whether the "*Chevron* doctrine," based on this Court's decision in

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), applies when an agency interprets a statute defining its jurisdiction.

BACKGROUND OF THE CASE

A. The Telecommunications Act of 1996

The underlying dispute involves the interpretation of two provisions of the Telecommunications Act of 1996 ("TCA") – subsections (A) and (B) of section 332(c)(7) – which grant authority to state and local governments to regulate personal wireless service facilities and impose limitations on the grant of such authority. 47 U.S.C. §§ 332(c)(7)(A), (B). Subsection (A) grants "[g]eneral authority" to state and local governments to regulate the placement, construction and modification of personal wireless service facilities, and provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit the authority" of state and local governments to adopt such regulations. *Id.* at § 332(c)(7)(A). Subsection (B) imposes "[l]imitations" on state and local authority to adopt such regulations. *Id.* at § 332(c)(7)(B). Specifically, subsection (B) provides that state and local governments shall not adopt regulations that "prohibit or have the effect of prohibiting" the provision of personal wireless services, *id.* at § 332(c)(7)(B)(i); that state and local governments must act on requests to place, construct or modify personal wireless facilities "*within a reasonable period of time*," *id.* at

§ 332(c)(7)(B)(ii); and that any person injured by a state or local government's "*failure to act*" may commence a judicial action within 30 days challenging the decision, *id.* at § 332(c)(7)(B)(v) (emphases added).

The Federal Communications Commission ("FCC") issued a Declaratory Ruling stating that the phrase "within a reasonable period of time," as used in subsection (B)(ii), presumptively means 90 days for applications requesting modifications, *i.e.*, "collocations," of existing personal wireless service facilities, and 150 days for all other applications. *City of Arlington, et al. v. Federal Communications Comm'n*, 668 F.3d 229, 235 (5th Cir. 2012). The FCC concluded that there has been no "failure to act" within the meaning of subdivision (B)(v) – and thus no basis for commencing a judicial action under that provision – as long as a state or local government acts on an application within the 90- and 150-day time frames. *Id.* The FCC determined that it was authorized to adopt the 90- and 150-day time frames under its general authority to make rules and regulations necessary to carry out the TCA's provisions. *Id.* at 247.

The City of Arlington argued below that subsection (A) precludes the FCC from implementing the limitations in subsection (B), and thus precludes the agency from adopting the 90- and 150-day time frames. *Id.* In rejecting the argument, the FCC concluded that subsection (A) merely precludes the FCC from imposing additional limitations on state and local authority beyond those imposed in subsection (B), and that subsection (A) does not otherwise restrict

the FCC's authority to implement the subsection (B) limitations. *Id.* In short, the FCC construed subsection (A) as not restricting its authority to adopt time frame presumptions under subsection (B).

B. The Fifth Circuit Decision

The Fifth Circuit applied the *Chevron* doctrine in upholding the FCC's interpretation of its authority under subsections (A) and (B). *Arlington*, 668 F.3d at 247-54. Under the *Chevron* doctrine, the courts must defer to an agency's interpretation of a statute that it is responsible for administering and enforcing, if the statute is ambiguous and the agency's interpretation is reasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Fifth Circuit acknowledged that this Court has never decided whether *Chevron* deference applies to an agency's interpretation of a statute defining its jurisdiction, and that the federal circuit courts disagree whether *Chevron* applies in this context. The court stated:

> The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeal have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an agency's jurisdiction, some do not, and some circuits have thus far avoided taking a position. In this circuit, we

> apply *Chevron* to an agency's interpretation of its own statutory jurisdiction, and therefore, we will apply the *Chevron* framework when determining whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames.

Arlington, 668 F.3d at 248 (footnotes omitted).[2] The court concluded that subsection (A) and (B) are ambiguous concerning the FCC's authority to adopt the time frame presumptions, that the FCC's interpretation of the subsections is not unreasonable, and therefore that the FCC's interpretation must be upheld under *Chevron*. *Id.* at 248-54.

The petition for writ of certiorari raises two questions, the first of which is whether the *Chevron* doctrine applies to an agency's interpretation of a statute defining its jurisdiction. This *amicus* brief addresses solely that question.

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[2] According to the Fifth Circuit, the Fifth, Third and Tenth Circuits have held that *Chevron* applies to an agency's interpretation of a statute defining its jurisdiction, the Seventh Circuit and Federal Circuit have held that *Chevron* does not apply, and the First and Sixth Circuits have avoided taking a position. *Arlington*, 668 F.3d at 248 & nn. 90-94.

SUMMARY OF ARGUMENT

The *Chevron* doctrine does not apply to an agency's interpretation of a statute defining its jurisdiction, if the agency construes the statute as expanding its jurisdiction and thus limiting the jurisdiction of state and local governments to regulate the subject matter. If *Chevron* were applied in this context, its application would contradict another, more salient canon of statutory construction – that under long-standing, constitutionally-based principles of federalism fashioned by this Court, Congress presumptively does not authorize federal regulation of subjects traditionally regulated by state and local governments under their police power or other authority. Congress presumptively does not authorize federal intrusion into traditional areas of state and local regulation unless Congress speaks with a clear voice – and, if Congress speaks with a clear voice, the statute is not ambiguous and the *Chevron* doctrine does not apply by its terms. The long-standing principles of federalism fashioned by this Court provide a more reliable guide for construing Congress' intent than the *Chevron* doctrine. Simply put, an agency cannot properly construe an ambiguous statute as expanding its jurisdiction at the expense of state and local jurisdiction over the subject matter, and – if an agency does so – the courts should not grant *Chevron* deference to the agency's construction. *Chevron* does not contradict or displace these long-standing principles of federalism, but instead provides a means for construing ambiguous statutes where these principles do not apply.

It follows that if an agency construes a statute as *limiting* its jurisdiction and not intruding into traditional areas of state and local regulation, the agency's construction is more likely to be congruent with principles of federalism established by this Court and to be entitled to *Chevron* deference. If, conversely, an agency construes a statute as *expanding* its jurisdiction and thus intruding into traditional areas of state and local regulation, the agency's construction is less likely to be congruent with these principles of federalism and to be entitled to deference. The authority of state and local governments to regulate subjects within their traditional areas of jurisdiction is entitled to greater deference than a federal agency's expansive interpretation of its authority under an ambiguous statute.

Indeed, this Court has declined to apply *Chevron* deference to an agency's interpretation of an ambiguous statute, such as the Clean Water Act, 33 U.S.C. § 1342(b), where the agency's interpretation expanded its jurisdiction to regulate subjects traditionally regulated at the state and local level, such as water use and land use. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). In *SWANCC*, this Court declined to apply *Chevron* deference because the agency's expansive interpretation of its jurisdiction would result in an "impingement" of the states' traditional regulatory authority, and Congress would not have "encroach[ed]" on the states' traditional authority

without a "clear expression" of its intent. *SWANCC*, 531 U.S. at 172-74. On the other hand, this Court recently applied *Chevron* in upholding and applying a federal regulation that *limited* federal authority under the Endangered Species Act, 16 U.S.C. §§ 1536(a)(2), (c)(1), and thus limited federal intrusion into areas traditionally regulated by the states. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Although this Court has never expressly distinguished for *Chevron* purposes between an agency's limiting and expansive definition of its jurisdiction, this Court's decisions in these and other cases support such a distinction.

The instant case provides an opportunity for the Court to clearly articulate the distinction for *Chevron* purposes between an agency's expansive and limiting interpretation of its statutory authority. Here, the FCC expansively interpreted its authority – and thereby narrowly interpreted state and local authority – to regulate personal wireless service facilities under the Telecommunications Act, and the Fifth Circuit mechanically applied *Chevron* in upholding the FCC's interpretation. In the *amici*'s view, the *Chevron* doctrine does not apply here, and the Fifth Circuit wrongly applied it.

This Court has never directly decided whether *Chevron* deference applies to an agency's interpretation of its statutory jurisdiction, and the federal circuit courts disagree concerning whether *Chevron* applies in this context. This Court should grant the

petition in order to decide this nationally-significant issue and resolve the conflict among the circuit courts.

ARGUMENT

I. THIS COURT HAS NEVER DIRECTLY DECIDED WHETHER THE *CHEVRON* DOCTRINE APPLIES TO AN AGENCY'S INTERPRETATION OF A STATUTE DEFINING ITS JURISDICTION. 4

Under the *Chevron* doctrine, an agency's interpretation of a statute that it administers is entitled to deference, if the statute is "silent or ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984); *see Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Under the *Chevron* doctrine, the reviewing court is required to undertake a two-step analysis: first, the court determines whether the statute is ambiguous, and, second, if the statute is ambiguous, the

court defers to the agency's interpretation if it is permissible. *Chevron*, 467 U.S. at 842-43.[3]

Although the *Chevron* doctrine on its face appears to categorically require deference if certain objective factors are present – that is, if the statute is ambiguous and an agency's interpretation is permissible – this Court has not always applied *Chevron* based on these objective factors, and instead has often considered additional factors in deciding whether to grant deference. For example, the Court has held that deference to an agency interpretation is particularly appropriate if the agency has made a "scientific determination" within the agency's "area of special expertise," thus indicating that deference is less appropriate if these factors are not present. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983); *see Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 656 (1980) (plurality opinion). This Court has construed federal statutes in order to avoid constitutional conflicts, thus limiting its deference to an agency's interpretation of the statute in such cases. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009). This Court has deferred to an agency's interpretation of its

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[3] Even if *Chevron* does not apply, a court may still defer to an agency's interpretation of a statute if the agency's interpretation is "persuasive." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

interpretation of its statutory jurisdiction, this Court has considered an important, and indeed apparently paramount, factor in determining whether *Chevron* applies in such circumstances – namely, whether the agency's interpretation expands its jurisdiction or instead limits its jurisdiction, and in particular whether an agency's expansive interpretation allows it to regulate subjects traditionally regulated by state and local governments under their police power or other authority. This Court has readily applied *Chevron* to an agency's limiting interpretation of its jurisdiction, but has rarely, if ever, applied *Chevron* to an agency's expansive interpretation of its jurisdiction, where the agency's expansive interpretation limits the traditional regulatory authority of state and local governments. If an agency interprets an ambiguous statute as authorizing it to regulate subjects normally regulated at the state and local level, countervailing principles of federalism come into play that limit deference to the agency's interpretation. Under these principles of federalism, Congress presumptively does not authorize federal intrusion into areas traditionally regulated by state and local governments unless it clearly says so – in which case the statute is not ambiguous and the *Chevron* doctrine does not apply by its terms. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (narrowly interpreting federal statute limiting state authority); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 767-68 n. 30 (1982) (same).

For example, this Court has held that Congress presumptively does not preempt state and local

authority to regulate subjects within their traditional areas of jurisdiction "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); "We ordinarily expect a 'clear and manifest' expression from Congress to authorize an unprecedented intrusion into traditional state authority. [Citation.]" *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). Similarly, this Court has held that the Commerce Clause of the Constitution limits Congress' power to enact laws that "effectually obliterate the distinction between what is national and what is local. . . ." *United States v. Lopez*, 514 U.S. 549, 557 (1995); *see United States v. Morrison*, 529 U.S. 598, 619 n. 8 (2000).

Thus, if a federal agency interprets an ambiguous statute as *limiting* its jurisdiction, the *Chevron* doctrine is more likely to converge with principles of federalism and be applied. If, on the other hand, the agency interprets an ambiguous statute as *expanding* its jurisdiction, and as authorizing it to regulate subjects traditionally regulated at the state and local level, the *Chevron* doctrine is more likely to diverge from principles of federalism and not be applied.

A. This Court Has Declined To Apply *Chevron* Deference To Agency Statutory Interpretations That Expand Agency Jurisdiction.

This Court has specifically declined to apply *Chevron* deference where an agency interpreted an ambiguous statute as authorizing the agency to expansively regulate subjects traditionally regulated by state and local governments, such as water use and land use.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), this Court declined to grant *Chevron* deference to a U.S. Army Corps of Engineers regulation authorizing the Corps to regulate "isolated" waters, *i.e.*, waters not physically connected to navigable waters, under the Clean Water Act. Under the Act, the Corps is authorized to regulate "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). Although the Court stated that the phrase "the waters of the United States" is not ambiguous, the Court also stated that – even if the phrase were ambiguous – there would be no basis for applying *Chevron*. *SWANCC*, 531 U.S. at 172-73. The Court stated that the states have traditionally and historically regulated non-navigable waters, and thus the Corps' assertion of jurisdiction over "isolated" waters – which by definition are not navigable – would result in a "significant impingement of the States' traditional and primary power over land and water use," *id.* at 161, 174, thus allowing "federal

encroachment upon a traditional state power," *id.* at 173. The Court stated that Congress would not have invoked the "outer limits" of its constitutional power without a "clear expression" of its intent. *Id.* at 172. Invoking its "prudential desire not to needlessly reach constitutional issues," *id.* at 172, the Court concluded that the Corps does not have jurisdiction under the Clean Water Act to regulate "nonnavigable, isolated, intrastate waters," *id.* at 166. The Court overturned the Seventh Circuit decision below, which had relied on *Chevron* in upholding the Corps' regulation. *SWANCC,* 191 F.3d 845, 853 (7th Cir. 1999), *rev'd,* 531 U.S. 159, 174 (2001). Thus, the Court declined to apply *Chevron* deference in determining the Corps' regulatory jurisdiction, and instead applied long-standing principles of federalism that recognize the primacy of state and local authority.

Subsequently, in *Rapanos v. United States*, 547 U.S. 715 (2006), this Court's plurality opinion again declined to apply *Chevron* deference to a regulation adopted by the Army Corps of Engineers under the Clean Water Act, which interpreted the phrase "the waters of the United States" – over which the Corps has jurisdiction – as including virtually all wetlands in the nation. Although the plurality opinion stated that the Corps' "expansive" interpretation of the phrase was foreclosed by its "natural definition,"

Rapanos, 547 U.S. at 731,[6] the plurality opinion also stated that "[e]ven if the phrase 'the waters of the United States' were ambiguous . . . , our own canons of construction would establish that the Corps' interpretation of the statute is impermissible." *Id.* at 737. Citing the Court's decision in *SWANCC*, the plurality opinion stated that "the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary authority over land and water use,'" and that "[w]e would ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id.* at 738 (citations and internal quotation marks omitted). Thus, the plurality opinion stated that the traditional canons of construction based on principles of federalism, rather than the *Chevron* doctrine, apply in construing an ambiguous jurisdictional statute. Although the dissenting opinion argued that the Court should apply *Chevron* deference in upholding the Corps' regulation, *id.* at 2252-53 (Stevens, J., dissenting), the plurality opinion rejected the argument.

Even before *Chevron*, this Court applied long-standing principles of federalism in construing the authority of federal agencies to regulate subjects

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[6] The plurality opinion interpreted the phrase "the waters of the United States" as including only "relatively permanent, standing or flowing bodies of water," *Rapanos*, 547 U.S. at 732, and as including only wetlands that have a "continuous surface connection" to such waters," *id.* at 742.

traditionally regulated by the states, such as water use and land use, rather than deferring to the federal agencies' interpretation of their jurisdiction. In *California v. United States*, 438 U.S. 645 (1978), this Court rejected the United States' argument that the Secretary of the Interior was authorized under the Reclamation Act of 1902 to regulate water uses served by federal reclamation projects in the western states. The Secretary had long taken the position that the Reclamation Act – which requires the Secretary to comply with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation," 43 U.S.C. §§ 372, 383 – requires the Secretary to comply only with state laws defining proprietary rights in water, and not with state laws regulating water uses served by the federal projects. The statutory language was unclear; indeed, this Court had earlier upheld the Secretary's determination that the statutory language applied only to proprietary rights. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 279 (1958). Nonetheless, this Court in *California* held that the statutory language requires the Bureau to comply with state laws regulating water uses served by the projects. The Court reasoned that Congress had adopted a long-standing policy of deferring to state water laws, and that this long-standing congressional policy informed the meaning of the Reclamation Act. *Id.* at 653. As the Court stated, "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent

thread of purposeful and continued deference to state water law by Congress." *Id.*[7] Thus, the Court deferred to Congress' long-standing policy of recognizing the supremacy of state water rights laws rather than the Secretary's expansive interpretation of his authority under the Reclamation Act. The outcome of the case would likely have been entirely different if this Court had granted *Chevron*-like deference to the Secretary's expansive interpretation of his authority.

B. Conversely, This Court Has Applied *Chevron* Deference To Agency Statutory Interpretations That Limit Agency Jurisdiction.

On the other hand, this Court has applied *Chevron* deference in upholding agency statutory interpretations that *limit* agency jurisdiction and that do not circumscribe the traditional regulatory authority of state and local governments.

In *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court applied *Chevron* deference in upholding a federal regulation limiting the authority of federal regulatory agencies under the Endangered Species Act ("ESA"). There,

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[7] On remand, the Ninth Circuit, in a decision written by then-Judge Kennedy, reaffirmed that the Reclamation Act must be read in light of Congress' long-standing policy of deferring to state water laws. *United States v. California*, 694 F.2d 1171, 1176, 1178 (9th Cir. 1982).

the State of Arizona applied to the U.S. Environmental Protection Agency ("EPA") for authority to administer its permit program under the Clean Water Act. The Clean Water Act provides that the EPA "shall" approve a state permit program that meets the Act's criteria. 33 U.S.C. § 1342(b). The EPA determined that the Arizona program met the statutory criteria, and approved the Arizona program. The Ninth Circuit held that the EPA violated the ESA by failing to "consult" with a designated service agency before approving the Arizona program. Under the ESA, a federal agency is required to "consult" with a designated service agency before taking any action "authorized, funded or carried out" by the agency that may affect an endangered species. 16 U.S.C. §§ 1536(a)(2), (c)(1).

This Court, overturning the Ninth Circuit decision, held that a regulation adopted by the Secretaries of Interior and Commerce, which defined the consultation obligation of federal agencies under the ESA, did not require the EPA to consult, and that under *Chevron* the Secretaries' regulation was entitled to deference. The Secretaries' regulation required federal agencies to consult in "all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). This Court held that – since the Clean Water Act provides that the EPA "shall" approve state permit programs that meet the statutory criteria – the EPA had no "discretionary" authority to disapprove the Arizona program, and therefore that the EPA was not required to

consult before approving the program. *Home Builders*, 551 U.S. at 665-68. Thus, the Court applied *Chevron* deference in upholding an agency regulation that *limited* an agency's consultation obligation under the ESA and thus avoided intrusion into areas traditionally regulated by the states.

Similarly, the Eleventh Circuit recently applied *Chevron* deference in upholding another federal regulation that limited federal jurisdiction under the Clean Water Act and thereby limited federal intrusion into traditional areas of state regulation. *Friends of the Everglades, et al. v. S. Fla. Water Mgmt. Dist., et al.*, 570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 131 S.Ct. 643 (2010). There, an EPA regulation provided that a transfer of water from one water body to another does not result in the "addition" of a pollutant to the second water body (even though the transfer may introduce a pollutant to the second water body) and therefore the transferor is not required to obtain a permit from the EPA under the Clean Water Act in order to make the transfer. 40 C.F.R. § 122.3(i). The Eleventh Circuit held that the Clean Water Act is ambiguous concerning whether a water transfer results in the "addition" of a pollutant; that the EPA's regulation provides a "permissible construction" of the statutory language; and therefore that deference was appropriate under *Chevron*. *Friends of the Everglades*, 570 F.3d at 1127. Notably, the court declined to follow the Second Circuit's earlier decision in *Catskill Mountains Chapter v. New York City*, 451 F.3d 77 (2d Cir. 2006), which had concluded – before

the EPA adopted its regulation – that an EPA permit was required for a water transfer. In effect, the Eleventh Circuit declined to follow the precedent of a sister circuit court, and instead deferred to an agency's limiting interpretation of its jurisdiction under *Chevron*, as this Court did in *Home Builders*.

C. The Fifth Circuit Wrongly Applied The *Chevron* Doctrine.

In this case, the FCC expansively interpreted its authority and narrowly interpreted the states' authority to regulate personal wireless service facilities under the TCA. Specifically, the FCC narrowly construed subsection (A) of 47 U.S.C. § 332(c)(7), which *grants* regulatory authority to the states, and expansively construed subsection (B), which *limits* the grant of authority to the states. *Arlington*, 668 F.3d at 235. Based on its construction, the FCC concluded that it has statutory authority to implement subsection (B)'s limitations of state authority. *Id.* Since the FCC expansively interpreted its authority and narrowly interpreted the states' authority, the Fifth Circuit wrongly applied the *Chevron* doctrine.

The *amici* do not contend that *Chevron* does not apply because the TCA is not "ambiguous," or because the FCC's interpretation is not "permissible." The *amici* do not address the question whether the FCC's interpretation of the TCA is correct or incorrect. Rather, the *amici* contend that the Fifth Circuit applied the wrong methodology by applying *Chevron* to

an agency's expansive interpretation of its statutory authority, an interpretation that circumscribed state and local authority over the same subject matter. The Fifth Circuit, rather than applying *Chevron*, should have determined the FCC's statutory authority under other canons of construction, which *inter alia* require consideration of the meaning, purpose and context of the statute. *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). Regardless of whether the Fifth Circuit reached the right result in determining the FCC's jurisdiction, the court employed the wrong methodology by applying *Chevron*.

This Court has never directly decided whether *Chevron* applies to an agency's construction of a statute defining its jurisdiction,* and the federal circuit

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* To be sure, Justice Scalia has argued that "we have held that this [*Chevron*] rule of deference applies to an agency's interpretation of a statute designed to confine its authority," *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring), although Justice Brennan argued in the same case that "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction." *Id.* at 349 (Brennan, J., dissenting). Regardless of whether Justice Scalia or Justice Brennan was right, there is at least disagreement among this Court's present and past members over whether the Court has decided the issue, which alone provides a basis for this Court to review the issue. The Fifth Circuit stated – correctly, in our view – that this Court has never resolved the issue. *Arlington*, 668 F.3d at 248. In any event, this Court has never expressly distinguished for *Chevron* purposes between agency interpretations that *limit* agency jurisdiction and agency interpretations that *expand* agency jurisdiction – although this Court's above-cited cases appear to support

(Continued on following page)

courts disagree concerning whether *Chevron* applies in this context. *Arlington*, 668 F.3d at 248. This Court should review the case to decide this nationally-significant issue and resolve the intercircuit conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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such a distinction – and this case presents an opportunity for this Court to expressly decide whether the distinction exists.

PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 11-1545

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; CITY OF LOS ANGELES, CALIFORNIA; COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; COUNTY OF SAN DIEGO, CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,

Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

This case involves a challenge to the FCC's jurisdiction to implement § 332(c)(7) of the Communications Act of 1934, titled "Preservation of Local Zoning Authority." Section 332(c)(7) imposes certain limitations on State and local zoning authority over the placement of wireless service facilities, but authorizes the FCC to address only one of these limitations; it states that no other provision "in this Act" may "limit" or "affect" State and local authority over wireless facilities placement. The FCC concluded that other provisions "in this Act" authorize it to adopt national zoning standards to implement § 332(c)(7).

The Fifth Circuit deferred to the FCC's jurisdictional determination applying *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), but acknowledged that "[t]he Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to this issue." The Court granted certiorari to decide the following question:

Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners below are the City of Arlington, Texas, and the City of San Antonio, Texas. Intervenors supporting the Petitioners are the Cable and Telecommunications Committee of the New Orleans City Council; the City of Carlsbad, California; the City of Dallas, Texas; the City of Dubuque, Iowa; the County of Fairfax, Virginia; the City of Glendale, California; the City of Los Angeles, California; the County of Los Angeles, California; the City of Portland, Oregon; the City of San Antonio, Texas; the County of San Diego, California; the EMR Policy Institute; the International Municipal Lawyers Association; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; the National League of Cities; the Texas Coalition of Cities for Utility Issues; and the United States Conference of Mayors.

Respondents are the United States of America and the FCC. Intervenors supporting the Respondents are CTIA-The Wireless Association and Cellco Partnership.

None of the petitioners is a non-governmental corporation.

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Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Jurisdiction, Agency Deference, and Statutory Silences*,
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BRIEF FOR PETITIONERS CITY OF ARLINGTON ET AL.

OPINION AND ORDER BELOW

The FCC's Declaratory Ruling (Pet. App. 69a-117a) is reported at 24 FCC Rcd. 13994 (Nov. 18, 2009), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010) (Pet. App. 172a-15a). The Fifth Circuit's opinion denying the petitions for review (*id.* 1a-68a) is published at 668 F.3d 229 (5th Cir. 2012).

JURISDICTION

The Fifth Circuit denied timely petitions for rehearing *en banc* on March 29, 2012. Pet. App. 195a-96a. This Court granted timely petitions for certiorari on October 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 332(c)(7) of the Communications Act of 1934, codified at 47 U.S.C. § 332(c)(7), provides in relevant part:

Preservation of local zoning authority.

(A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless

service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local

> government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Other relevant statutory provisions appear in the Appendix to the petition for certiorari.

STATEMENT OF THE CASE

This case involves a challenge to the FCC's asserted authority to render binding interpretations of Section 332(c)(7) of the Communications Act beyond the one provision (47 U.S.C. § 332(c)(7)(B)(iv) (addressing radio frequency ("RF") emissions)) over which Congress grants it authority. After the agency determined that it had such authority based on general provisions of the Communications Act, including Section 201(b), the agency issued a Declaratory Ruling construing the statute to impose, among other things, uniform national deadlines for State and local government action on applications to site wireless service facilities.

Petitioners challenged, *inter alia*, the FCC's authority to issue those rules. In considering the challenge, the Fifth Circuit began with the threshold question whether Congress had given the agency interpretive authority over the statute. However, rather than resolving this question *de novo*, the court

of appeals deferred to the FCC's view of the scope of its own statutory jurisdiction.

I. Statutory And Regulatory Framework

1. As part of the Telecommunications Act of 1996, Congress amended the Communications Act to add Section 332(c)(7). Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996) (codified at 47 U.S.C. § 332(c)(7)). That provision establishes "minimum federal standards" to govern the placement, construction, and modification of wireless communications facilities, while retaining the traditional authority of State and local governments over siting decisions and local land use processes. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring).

Section 332(c)(7) consists of two subparagraphs. Subparagraph (A) is a "General authority" provision stating that "[e]xcept as provided in this paragraph, nothing in [the Communications Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Subparagraph (B), in turn, sets forth five enumerated limitations on State and local zoning authority. *Id.* § 332(c)(7)(B)(i)-(v). The statute gives the FCC authority to address only one of those limitations – the bar on State and local siting decisions based on the environmental effects of RF emissions. *Id.* § 332(c)(7)(B)(iv); *see also id.* § 332(c)(7)(B)(v) (authorizing any person adversely affected by State or local action "that is inconsistent with clause (iv) [to] petition the Commission for re-

lief"). Otherwise, the statute directs courts to resolve issues arising under Section 332(c)(7) on an expedited basis. *Id.* § 332(c)(7)(B)(v).

The Conference Report accompanying the legislation confirmed that except for the provisions concerning the effects of RF emissions, Congress intended for the courts to have "exclusive jurisdiction over all other disputes arising under this section." H.R. Rep. No. 104-458 (1996) (Conf. Rep.) at 207-08, Pet. App. 209a. The Report accordingly directed that "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service facilities should be terminated." *Id.*

Among the limitations in Section 332(c)(7)(B) is a requirement that a State or locality "shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed . . . , taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). The Conference Report explained that "the time period for rendering a decision" under that provision "will be the usual period under such circumstances." Pet. App. 210a. It further noted that the requirement was not intended "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." *Id.*

In the twelve years subsequent to the statute's enactment, the FCC did not claim the general authority to adopt rules implementing the statute, in-

stead leaving it to the courts to resolve disputes based on local circumstances.

2. In 2008, the wireless industry – led by respondent CTIA-The Wireless Association – filed a petition for a declaratory ruling asking the FCC to, *inter alia*, adopt short, uniform deadlines for State and local action under Section 332(c)(7). States and local governments, including petitioners, responded that the FCC lacked jurisdiction to issue any binding rule implementing Section 332(c)(7), other than one related to RF emissions.

a. In 2009, the FCC rejected that objection and issued a Declaratory Ruling granting the industry its requested relief in significant part. As relevant here, the FCC adopted national standards defining what constitutes a State or local government's "failure to act" if it does not release a decision on a wireless facility application within "a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." Pet. App. 116a-20a, ¶¶ 46-48. The FCC ruled that absent an applicant's agreement, if the failure of a State or local government to release its decision 90 days after the applicant files a complete collocation application or within 150 days after the filing of all other complete applications, automatically constitutes a "failure to act," and presumptively constitutes an unreasonable "period of time" on the merits. Pet. App. 72a, 106a-08a, 111a-12a (¶¶ 4, 37, 42). Unless the applicant agrees otherwise, the rule forces the State or local government into court on a fixed timetable (regardless of how reasonable its delay may be), and then requires the State or local government to over-

come the presumption on the merits by explaining its delay. Pet. App. 111a-12a (¶ 42).

The FCC acknowledged that its 90- and 150-day deadlines would conflict with time periods in place in various States, but concluded that its policy choices would accommodate reasonable State and local processes "in most instances." Pet. App. 114a (¶ 44). However, in States where a longer period for review was in effect, an applicant could now sue the State or local government under the FCC's new, shorter timelines. Pet. App. 120a (¶ 50) (providing that the applicant "may bring suit under §332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired").

b. In addressing its power to issue the Declaratory Ruling, the FCC stated that it had "the authority to interpret Section 332(c)(7)" pursuant to four other provisions of the Act – Sections 1, 4(i), 201(b), and 303(r). Pet. App. 87a (¶ 23). Those provisions generally permit the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); Pet. App. 87a (¶ 23); *see id.* 90a (¶ 24) ("Section 332(c)(7) falls within the Act; accordingly, the Commission has the authority to interpret it."). On the basis of that asserted interpretive authority, the FCC construed Section 332(c)(7)(A) – the preservation clause stating that "nothing" else "in this Act" may "limit" or "affect" State and local authority – as only prohibiting the agency from creating additional "limitations" beyond those that the

statute enumerates. Pet. App. 90a, 134a (¶¶ 25, 64). Thus, the FCC concluded that it was free to adopt the specific time periods and issue other binding interpretations of Section 332(c)(7)(B) because, in its view, the rules "merely interpret[] the limits Congress already imposed on State and local governments." Pet. App. 90a (¶ 25).

The FCC also applied its claimed interpretive authority to Section 332(c)(7)(B)(v), which provides for judicial review of violations of Section 332(c)(7)(B), while providing a right to petition the FCC for one category of violations – those relating to RF emissions. The FCC ruled that this provision did not indicate that Congress intended for courts to have final authority to interpret Section 332(c)(7)(B). Instead, the agency construed the statute "not [to] divest the Commission of its authority . . . to adopt and enforce rules implementing" the statute. Pet. App. 92a (¶ 26).

II. Procedural History

The Fifth Circuit denied petitioners' petition for review. Pet. App. 68a. The court of appeals began its analysis by assessing whether the FCC had been granted the authority to adopt a binding interpretation of Sections 332(c)(7)(A) and (B)(v). The court recognized that the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "does not apply once it is determined that an agency lacks authority to interpret a statute." Pet. App. 36a. However, the court acknowledged a circuit conflict on "whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction." Pet. App. 36a-37a.

Looking to circuit precedent, the court concluded that it must apply *Chevron* to the FCC's assertion of interpretive authority over Sections 332(c)(7)(A) and (B)(v), rather than address that question *de novo*.

Applying that approach, the court found that the provisions did not "unambiguously indicate Congress's intent to preclude the FCC from implementing § 332(c)(7)(B)(ii) and (v)" through the issuance of binding rules. Pet. App. 41a-45a, 51a. That finding of ambiguity, the court believed, required it to defer to the agency's view of the scope of its own interpretive authority so long as that construction was "based on a permissible construction of the statute." *Id.* 45a, 51a. In so ruling, the court did not apply traditional canons of statutory construction to determine whether Congress empowered the FCC to displace State and local regulatory authority over zoning matters.

The court then proceeded to defer to the FCC again, this time with respect to the substantive validity of the 90- and 150-day time limitations. Pet. App. 51a-63a. Applying *Chevron*, the court concluded that the statutory terms "a reasonable period of time" and "failure to act" are ambiguous, and that it therefore owed "substantial deference to the FCC's interpretation of those terms." *Id.* 53a. The court upheld the regulation under *Chevron* Step 2 as a permissible construction of the statute. Again the court gave no consideration to whether the FCC was entitled to a lesser degree of deference in light of the regulation's expansion of federal power in relation to that of the States.

This Court subsequently granted certiorari.

SUMMARY OF THE ARGUMENT

There are three stages to a court's determination whether an agency has validly implemented a statute by adopting rules that have the force of law. The court begins with the threshold question (sometimes referred to as *Chevron* Step 0) whether Congress delegated the agency authority – *i.e.*, jurisdiction – to issue binding interpretations of the statute. If the court determines that the agency has this authority, it is in traditional "*Chevron*" territory. The court then determines (in *Chevron* Step 1) whether there is any substantive "gap" for the agency to fill, or whether Congress instead resolved the specific statutory question. If Congress did not, then the court determines (in *Chevron* Step 2) whether the agency's interpretation is sufficiently reasonable to be sustained.

The Fifth Circuit in this case correctly recognized the *Chevron* inquiry's three-stage structure. At the outset, the court addressed whether Congress intended the FCC to adopt binding interpretations of Section 332(c)(7)(B) – most notably, whether Congress intended to empower the FCC to issue rules specifying when a local government will have "fail[ed] to act" within a "reasonable period of time." Only after deciding this question did the court of appeals ask whether there was a gap for the agency to fill (*Chevron* Step 1) and whether the FCC's rules were substantively reasonable (Step 2).

Despite properly structuring its *Chevron* inquiry, when the Fifth Circuit sought to resolve the threshold question of whether Congress had granted the FCC the power to issue binding rules implement-

ing Section 332(c)(7), it erred. To decide this question, the court of appeals deferred to the FCC's views. The court found the jurisdictional question ambiguous. It then did not resolve the ambiguity itself with its best reading under a *de novo* standard. The court instead found that it must accept any FCC reading of its own statutory jurisdiction that is not "impermissible."

This was error. A court does not defer to an agency's determination of its own jurisdiction to adopt binding interpretations of a statute (*Chevron* Step 0). The Fifth Circuit's contrary decision is irreconcilable with decades of this Court's administrative law precedents. These decisions – none of which suggests deference to the agency at Step 0 – are firmly rooted in the distinct roles of courts and agencies in our constitutional structure. The federal courts are the arbiters of the allocation of power between the branches of government, and they generally have the final word on the meaning of congressional enactments. A court must make its own judgment whether Congress intended to compel the court to accept the agency's statutory interpretation over its own.

To be sure, Congress does in some circumstances assign to agencies the responsibility to resolve ambiguities in federal statutes and to make interstitial judgments about the scope of federal law, especially on statutory questions that require specialized or technical expertise. And when Congress demonstrates this intent, the agency's views on a statute's meaning may be entitled to substantial deference. But the antecedent determination – whether Con-

gress gave the agency that authority – is not a question that generally calls for agency expertise. And the mere fact that Congress did not unambiguously state that the agency lacks jurisdiction is not sufficient to shift ultimate authority from the courts to the agency.

The Fifth Circuit held to the contrary: that a statutory ambiguity on the threshold question whether Congress intended an agency to have interpretive jurisdiction obligates the court to accept the agency's reading over its own. In holding that ambiguity in the statute triggered deference, the court of appeals simply assumed the conclusion to the very question that the threshold jurisdictional analysis seeks to answer — in this case, whether Congress intended the FCC to implement Section 332(c)(7).

This Court accordingly can resolve this case by recognizing that the Fifth Circuit erred in according the FCC deference on the threshold question of the agency's interpretive authority over Section 332(c)(7). The court of appeals believed that the deference accorded to the FCC was essential to the court's ultimate decision upholding the agency's rule. The court emphasized its deference to the FCC's view that it had this final interpretive authority. And in turn the FCC's authority to issue its rules depends on the agency's claimed authority to determine the meaning of Sections 332(c)(7). The judgment accordingly should be vacated and the case returned to the court of appeals to make a *de novo* determination of the FCC's jurisdiction.

If this Court goes further, and applies a *de novo* standard to determine whether Congress delegated

the FCC authority to issue binding interpretations of Section 332(c)(7), the Court should hold that Congress did not do so. Under a *de novo* standard, any ambiguity regarding the agency's jurisdiction is resolved by applying standard rules of statutory interpretation. Where, for example, an agency's claim of authority to implement a statute would give it unprecedented new powers, subvert basic legal principles, trench on authority reserved to others, or implicate constitutional concerns, courts resolve any ambiguity by presuming that Congress did not grant the agency authority. That is the case here. Because Congress adopted Section 332(c)(7) to preserve State and local authority and deliberately elected to assign oversight to the courts (not the FCC), any ambiguity about the FCC's powers under this statute should be resolved *against* the agency.

ARGUMENT

Petitioners challenge the validity of rules promulgated by the FCC that purport to adopt binding interpretations of Section 332(c)(7). In considering this challenge, the Fifth Circuit correctly began its analysis by determining whether Congress intended to grant the FCC the power to authoritatively interpret the provision. But to make this threshold determination, the court of appeals erred by deferring to the agency's own views of its jurisdiction. The court should have instead made this jurisdictional assessment *de novo*.

I. A Court's Determination Whether An Agency Has Issued A Binding Statutory Interpretation Begins With Its *De Novo* – Not Deferential – Determination Of The Agency's Jurisdiction.

Within our federal system of limited and enumerated powers, political actors do not define the scope of their own authority. Those decisions are for the courts, a branch of government insulated from the political pressures that might otherwise influence these jurisdictional determinations. To this fundamental principle, the deference accorded agencies under the *Chevron* doctrine makes no exception. That deference does not attach to threshold jurisdictional questions, but follows after a court has independently confirmed an agency's jurisdiction.

A. An Agency's Statutory Construction Can Be Binding Only If Congress Has Conferred Interpretive Power On The Agency.

1. The administrative state operates at the intersection of the three branches of government under the Constitution. Article I "vest[s]" in Congress "[a]ll legislative Powers herein granted." U.S. Const. art. I, § 1. Article II gives the Executive the power to "enforce[]" the law. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). And under Article III, courts are generally the final arbiters of the meaning of the law. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to re-

solve a case or controversy."); *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

These foundational principles are the starting point for any inquiry into the scope of an agency's authority. Consistent with Article II, an agency presumptively has the power only to enforce the law. An agency can acquire "lawmaking" authority only to the extent that Congress confers that power on it. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Likewise, an agency's resolution of a legal question is binding and trumps that of a court only if Congress intends the agency to have the final authority to interpret (and indeed make) "law." *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Regents of Univ. Sys. of Georgia v. Carroll*, 338 U.S. 586, 597-98 (1950) ("As an administrative body, the [FCC] must find its powers within the compass of the authority given it by Congress"); 5 U.S.C. § 558(b) (a substantive rule or order may not be issued "except within jurisdiction delegated to the agency and as authorized by law").

Because an agency "may not confer power upon itself," *Louisiana PSC*, 476 U.S. at 374, the scope of an agency's legal authority is for a court to determine. Courts, not agencies, must "decide all relevant questions of law," "interpret constitutional and stat-

utory provisions," and set aside an agency conclusion that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

2. The *Chevron* doctrine fits comfortably within these constitutional principles. *Chevron* itself made clear that an agency may issue binding legal interpretations only with respect to statutes for which Congress has delegated the agency authority. 467 U.S. at 865 (indicating that an agency "to which Congress has delegated policymaking responsibilities" may make policy "within the limits of that delegation"). The Court repeatedly stated that the agency interpretation before it was entitled to deference because Congress had committed the statutory question to the agency's care. *Id.* at 842 (referring to statute "which [the agency] administers"); *id.* at 844 (noting that "weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *id.* at 845 (deference applies to "conflicting policies that were committed to the agency's care by the statute" (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961))); *id.* at 863 (describing the EPA as "the agency primarily responsible for administering this important legislation").

The assessment of agency deference accordingly always begins with the determination whether Congress intended to assign the agency authoritative interpretive power over the statute. This threshold determination is sometimes referred to as *Chevron* Step 0. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 836 (2001). It addresses what might be called the agen-

cy's "interpretive jurisdiction": whether Congress empowered the agency, rather than the courts, to resolve ambiguities in the statute.

This Court's subsequent decisions have confirmed that "[a] *precondition* to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (emphasis added). Only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," is *Chevron* deference warranted. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) ("[T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." (emphasis omitted)).

When it is apparent that Congress "has delegated the responsibility for administering [a] statutory program," courts must "respect" reasonable agency interpretations that are within the scope of the delegation. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 843-44. However, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit*, 494 U.S. at 650

(quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

If a court finds sufficient evidence "from the agency's generally conferred authority and other statutory circumstances" that Congress did intend to confer on the agency the authority to issue binding interpretations of a statute, *Mead*, 533 U.S. at 229, then the court will address the agency's resolution of substantive statutory interpretation issues under *Chevron*'s two-step formula. The two-step inquiry relates to the validity of what might be called the agency's "substantive jurisdiction" – the agency's power to fill statutory gaps in particular ways. If the court finds under *Chevron* Step 1 that Congress has not eliminated the agency's discretion over the specific subject matter by unambiguously addressing "the precise question at issue," *Chevron*, 467 U.S. at 842, then, under *Chevron* Step 2, the court will defer to the agency's construction so long as it is reasonable, *id.* at 843-44. But if Congress has not delegated the agency interpretive authority over the statute, then the agency's substantive interpretation "is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

B. A Court Determines Whether Congress Delegated An Agency Interpretive Authority *De Novo*.

At the threshold, Step 0 stage of the *Chevron* inquiry, a court determines Congress's intent *de novo*; it does not defer to an agency's views. This Court has considered the validity of agency regulations,

rules, and pronouncements in dozens of cases. Whenever an issue has arisen regarding the agency's authority to issue a binding statutory interpretation, the Court has uniformly considered the scope of the agency's authority *de novo* – assessing factors such as whether Congress empowered the agency to make rules with the force of law, whether the agency's expressed views are authoritative, and whether the agency's position is well-reasoned, to name a few. But contrary to the Fifth Circuit's decision in this case, this Court has *never* deferred to the agency's view that Congress intended to delegate it authority. *See, e.g.*, *Astrue v. Capato ex rel B.N.C.*, 132 S. Ct. 2021, 2033-34 (2012) (determining based on the language of the Social Security Act and the rulemaking procedure utilized by the Social Security Administration that Congress had empowered the Administration to make rules with the force of law); *Negusie v. Holder*, 555 U.S. 511, 515-16 (2009) (holding that the Board of Immigration Appeals generally has the power to make rules with the force of law, but when its interpretation was premised on a legal error, that interpretation was not entitled to deference until the Board had an opportunity to revisit it on remand); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (holding that "the [EEOC's] policy statements, embodied in its compliance manual and internal directives, interpret not only the regulations but also the statute itself," and therefore merited only *Skidmore* deference); *Long Island Care at Home, Ltd.*, 551 U.S. at 165 (conducting *de novo* textual analysis of the Fair Labor Standards Act and determining that the statute "explicitly leaves gaps" and "provides the Department with the power to fill

these gaps through rules and regulations" so that ensuing regulations merit *Chevron* deference); *Gonzales*, 546 U.S. at 258-68 (conducting full *de novo* review of the Controlled Substances Act and concluding that notwithstanding ambiguity in the statute, "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law"); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (recognizing on *de novo* review that Congress had delegated power to the FCC to enforce the Communications Act through binding legal rules); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (recognizing on *de novo* review that Congress has expressly delegated rulemaking authority to the Federal Reserve Board to enforce the Truth in Lending Act); *Alaska Dept. of Envt'l Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) (conducting *de novo* review to determine that the EPA's interpretation, "presented in internal guidance memoranda," lacked the force of law and therefore did not merit *Chevron* deference); *Barnhart v. Walton*, 535 U.S. 212, 217, 221-22 (2002) (conducting *de novo* review to defer to Social Security Administration rule enacted pursuant to "statutory rulemaking authority"); *Mead*, 533 U.S. at 233-34 (conducting *de novo* review to determine from the "face of the statute," the "agency practice," and "the amendments to the statute made effective after this case arose" that Customs' letter rulings did not have the force of law); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (conducting *de novo* review to hold that when "an administrative interpretation of a statute invokes the outer

limits of Congress' power, we expect a clear indication that Congress intended that result," and thus denying deference when an administrative regulation threatened the balance of federalism); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding on *de novo* review that interpretive rules that lack the force of law "do not warrant *Chevron*-style deference"); *Smiley v. Citibank, N.A.*, 517 U.S. 735, 739 (1996) (holding on *de novo* review that Congress intended for the Comptroller of the Currency to enforce and interpret the National Bank Act); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (conducting *de novo* review to "infer from the structure and history of the statute" whether Congress had delegated interpretive authority to the Secretary of Labor); *Bowen*, 488 U.S. at 212-13 (denying *Chevron* deference to an agency litigating position that was not rooted in the agency's delegated authority).

In *Adams Fruit*, the Court refused to defer to the Department of Labor's position that the private right of action under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) was limited by state workers' compensation laws. Noting that "*Chevron* review of agency interpretations of statutes applies only to regulations 'promulgated pursuant to congressional authority,'" the Court held that Congress had not "empower[ed] the Secretary to regulate the scope of the judicial power vested by the statute." 494 U.S. at 649-50 (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 204, 208 (1987)). The Court accorded no deference to the agency's views in making that determination. Rather, it was based on the Court's *de novo* conclusion that "[n]o such dele-

gation regarding AWPA's enforcement provisions is evident in the statute." *Id.* at 650. The Court's own review of the statute indicated that "Congress established an enforcement scheme independent of the Executive." *Id.* Based on this determination, the Court concluded that "it would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy." *Id.*

The Court likewise addressed the delegation issue *de novo* in *Mead*. The inquiry in that case was whether there was any "indication," either on "the face of the statute" or elsewhere, that "Congress meant to delegate authority to Customs to issue classification rulings with the force of law." 533 U.S. at 231-32. The Court's analysis of that question did not include any deference to the agency's views. Instead, the Court independently reviewed the statutory text – looking to, for example, a "provision for independent review" of the agency rulings at issue – and concluded that "[i]t is hard to imagine a congressional understanding more at odds with the *Chevron* regime." *Id.* at 232-33.

The Court followed the same approach in *Gonzales v. Oregon*, 546 U.S. 243 (2006). There, the Attorney General argued that an interpretive rule prohibiting the prescription of regulated drugs for use in physician-assisted suicide was entitled to *Chevron* deference in light of his rulemaking authority under the Controlled Substances Act (CSA). The Court, however, held that "[t]o begin with," it must be determined whether the rule was "promulgated pursuant to authority Congress has delegated to the offi-

cial." *Id.* at 258. In conducting this analysis, the Court accorded no deference at all to the Attorney General's view of the scope of his interpretive authority, but instead conducted a *de novo* review of the statute's text, structure, and history. *See, e.g., id.* at 262 (noting that the interpretive rule "cannot, and does not, explain why the Attorney General has the authority to decide what constitutes an underlying violation of the CSA in the first place"); *id.* at 263 ("The statutory terms 'public interest' and 'public health' do not call on the Attorney General . . . to make an independent assessment of the meaning of federal law."). That is, a statute's mere ambiguity does not automatically translate into jurisdictional authority to address the ambiguities.

Other decisions of this Court likewise recognize that the determination of the scope of an agency's delegated authority is to be conducted by the court *de novo* and without deference to the agency's views. *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378-84, 387 (1999) (addressing "what might be called underlying FCC jurisdiction" without relying on *Chevron* deference, then applying *Chevron* to the agency's determinations on the merits); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). These cases reflect the logical principle that "if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to an agency's views on whether a delegation has taken place." Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Jurisdiction, Agency Defer-*

ence, and Statutory Silences, 2009 U. Ill. L. Rev. 1497, 1564 (2009).

Even in the view of jurists who maintain that an agency's assertion of "jurisdiction" is entitled to deference, the question of whether Congress delegated an agency interpretive authority remains for the courts alone. For example, Justice Scalia has stated his understanding that it is "settled law" under the Court's precedents "that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment). But the cited precedents all involved a very different form of jurisdiction: the *scope* of the agency's delegated power, as opposed to the antecedent question whether Congress had delegated interpretive authority to the agency. In each, Congress's delegation of interpretive jurisdiction over the relevant statute had already been established.[1] In several other opin-

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[1] *See City of New York v. FCC*, 486 U.S. 57, 67 (1988) (deference to regulations warranted where statute "grants the Commission the power to 'establish technical standards'" (citation omitted)); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 843, 845 (1986) (deference warranted where statute gave "broad grant of power" to agency to decide "whether a particular regulation" was reasonably necessary); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (deference warranted where "power delegated to the FCC plainly comprises authority to regulate" cable television signals); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (deference to agency "on an issue that implicates its expertise in labor relations" warranted where Court had

ions, Justice Scalia has adhered to the settled principle that the inquiry into an agency's delegated authority to interpret a statute is to be conducted *de novo*.[2]

Similarly, as the petition for certiorari explained, several courts of appeals hold that an

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previously determined "that the task of defining the scope" of the statute was for agency); *CBS, Inc. v. FCC*, 453 U.S. 367, 386 (1981) (deference warranted where "Congress . . . charged the Commission with [statute's] enforcement"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969) (upholding regulations where Congress "ratified" agency construction "with positive legislation"). In the other cited case, *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351 (1941), the Court declined to defer to an agency construction that was inconsistent with the statute's "obvious meaning."

[2] *See, e.g.*, *Smiley*, 517 U.S. at 739 (1996) (Comptroller of Currency receives deference for reasonable interpretations of National Bank Act because Comptroller "'is charged with the enforcement of banking laws'" (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995))); *Gonzales*, 546 U.S. at 297 (Scalia, J., dissenting) (arguing, based on *de novo* analysis, that the Attorney General's interpretation of Controlled Substances Act was entitled to deference); *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring) (arguing that deference was owed to EEOC's interpretation of Age Discrimination in Employment Act because statute "confers upon the EEOC authority to issue 'such rules and regulations as it may consider necessary or appropriate for carrying out' the ADEA") (citation omitted)); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 601 (2004) (Scalia, J., dissenting) (arguing that EEOC's interpretation of ADEA was entitled to deference because EEOC is "the agency tasked by Congress with enforcing the ADEA").

agency's assertion of "jurisdiction" is entitled to deference. Pet. 13-16. But when presented with the issue in this case – whether Congress delegated interpretive authority – each of those courts decides the question *de novo*.[3]

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[3] *See, e.g.*, *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 303 (3d Cir. 2012) (holding that the Commissioner of Social Security was only entitled to *Skidmore* deference because the relevant interpretation had not been issued pursuant to her delegated authority); *Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 281 (3d Cir. 2005) (holding that the Secretary of Health and Human Services was owed *Chevron* deference because "in the case before us there is adequate indication of congressional intent in the statute to demonstrate substantial delegation of authority to the Secretary"); *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 453-54 (5th Cir. 2008) (rejecting government's request for *Chevron* deference to an IRS revenue ruling because the ruling was not issued pursuant to delegated authority and because the IRS, outside the litigation, had not treated it as having the force of law); *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 928 (5th Cir. 2012) (holding that statements made in a guidance document, as well as appellate counsel's statements, were entitled only to *Skidmore* deference); *Godinez-Arroyo v. Mukasey*, 540 F.3d 848 (8th Cir. 2008) (considering *de novo*, without deciding, whether unpublished orders of the Board of Immigration Appeals (BIA) have the "force of law" and therefore merit *Chevron* deference); *Carpio v. Holder*, 592 F.3d 1091, 1096-98 (10th Cir. 2010) (holding that unpublished BIA orders do not have the force of law and so do not merit *Chevron* deference); *Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1243 (10th Cir. 2003) (rejecting a request for *Chevron* deference and applying *Skidmore* to the EPA's informal characterizations of events for purposes of assessing a CERCLA statute of limitations).

II. The Court of Appeals Erred By Not Resolving *De Novo* The Threshold Question Whether Congress Granted The FCC Interpretive Jurisdiction Over Section 332(c)(7).

The Fifth Circuit's decision cannot be squared with the precedents above. Indeed, the case underscores why a court must make the threshold, jurisdictional inquiry *de novo*.

A. The Fifth Circuit Should Not Have Deferred To The FCC's Determination Of Its Own Jurisdiction Over Section 332(c)(7).

The Fifth Circuit found that its own circuit precedent required it to resolve whether the FCC has interpretive jurisdiction over Section 332(c)(7) by deferring to the FCC's view. Pet. App. 37a. The court accordingly never sought to evaluate the FCC's statutory jurisdiction itself, by adopting the statute's best reading *de novo*. The court instead asked only whether the FCC's reading was "impermissible." Pet. App. 51a. This was wrong for several reasons.

First, this Court's decisions discussed above remove any doubt that the threshold determination whether Congress empowered an agency to implement a statute (Step 0) is for a court, not an agency. Deference to the agency does not apply to, but follows, the Court's confirmation of a delegation under this "precondition." *Adams Fruit Co.*, 494 U.S. at 649.

Second, applying *Chevron* to this preliminary jurisdictional question defies Congress's standard choice to leave jurisdictional questions to a neutral

body, the courts. The FCC has only those powers that Congress grants it. The agency also has an incentive to limit or expand these powers to further its own interests. Independent judicial review serves as an important check. But applying *Chevron* to an agency's determination of its own jurisdiction – as opposed to technical or specialized matters over which Congress has granted the agency authority – undermines Congress's ordinary allocation of authority between the branches. Here, Congress sought to preserve State and local zoning authority, not to structure the zoning process around a federal agency's "policy." Pet. App. 212a-13a. Yet now the FCC has implemented the statute, at least in part, to further national "goals that the Commission sought to advance" in other proceedings and under other statutes. *Id.* 105a. By requiring a court to accept any "permissible" reading over the court's best reading, the doctrine elevates an agency's self-interested reading over a neutral one. *See generally* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 244 (2004).

Third, deferring to an agency on the question of the scope of an agency's jurisdiction assumes that an agency has inherent authority to make jurisdictional determinations unless Congress uses unambiguous language to deny it. This view cannot be squared with the fundamental rule that an agency only has the powers that Congress has conferred upon it. *Louisiana PSC*, 476 U.S. at 374; *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

Fourth, the assumption of the court of appeals that Congress intended to confer interpretive au-

thority on the FCC runs afoul of settled nondelegation principles. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citation omitted). This Court accordingly has explained that "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Congress thus cannot be presumed to have intended to delegate legislative power to an agency, and federal statutes should be construed to avoid that constitutional issue if such a construction is "fairly possible." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012).

A rule treating statutory ambiguity as evidence that Congress has given interpretive authority to an agency stands these constitutional principles on their head. The power to define the scope of an agency's power to interpret federal law, and thereby to "create regulatory jurisdiction where none existed[,] is quintessentially 'legislative' power." Sales & Adler, *supra*, at 1565 n.246. In light of the grave constitutional concerns that such a delegation would create, a statutory ambiguity cannot provide a basis for presuming, as the Fifth Circuit did, that Congress intended that result. To the contrary, this Court's constitutional avoidance precedents teach that courts should instead adopt the opposite pre-

sumption.

Fifth, applying *Chevron* deference to this preliminary jurisdictional question does not fit the rationale of *Chevron* itself. In *Chevron*, the Court criticized the D.C. Circuit for rejecting the EPA's interpretation of a specialized, technical question: the definition of "stationary source." *Chevron*, 467 U.S. at 846. For this question, the court recognized that "[j]udges are not experts in the field"; the EPA is. *Id.* In contrast, the question whether Congress expressly or implicitly conferred authority is one on which courts, not agencies, are expert. *See, e.g.*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("Congress may have intended *not* to leave the matter of a particular interpretation up to the agency . . . where an unusually basic legal question is at issue.").

Finally, the Fifth Circuit's approach effectively assumes the answer to the very question that is antecedent to *Chevron* deference. In determining whether Congress intended for the FCC or the courts to resolve ambiguities in Sections 332(c)(7)(A) and (B)(v), the court of appeals held that those provisions' *own ambiguity* required it to resolve the question in favor of the FCC. *See* Pet. App. 45a, 51a (holding that "the FCC is entitled to deference" because "[t]he language of § 332(c)(7) is silent" regarding its interpretive authority). By assuming away the answer to that threshold question, the court failed to execute its Article III duty to ensure that Congress intended to confer interpretive power on

the agency. Instead, it allowed the agency to "confer power upon itself." *Louisiana PSC*, 476 U.S. at 374.

B. This Case Underscores Why Courts Do Not Defer To An Agency On This Threshold Jurisdictional Question.

This case underscores why courts do not – and must not – defer to an agency's views of its own interpretive jurisdiction. Here, the contextual evidence that Congress did not empower the FCC to structure Section 332(c)(7) around its own rules is overwhelming. Deferring to the FCC's view of its own jurisdiction forces a court to ignore this.

Congress made it abundantly clear that Section 332(c)(7) is not a garden-variety Communications Act provision for FCC implementation, but instead a unique effort to rely on State and local land use processes and the case-by-case oversight of the courts. The provision is titled "Preservation of local zoning authority," and it has been described as an "experiment in federalism." *Town of Amherst v. Omnipoint Commc'ns Enters. Inc.*, 173 F.3d 9, 17 (1st Cir. 1999). It provides that, "[e]xcept as provided in this paragraph," no other provision of the Communications Act shall "limit or affect" State or local authority regarding the location of personal wire service facilities. 47 U.S.C. § 332(c)(7)(A). It gives the FCC the power to address one of the statutory limitations on State and local authority – the bar on siting decisions based on the environmental effects of radio frequency (RF) emissions, *id.* § 332(c)(7)(B)(iv) – but otherwise leaves disputes to judicial resolution, *id.* § 332(c)(7)(B)(v). By its terms, then, the statute permits the FCC to act where Section 332(c)(7) gives

it a role (to address RF matters), while shielding State and local authority from any "limit" or "[e]ffect" caused by any other provision of the Act. Thus, like the provision at issue in *Louisiana PSC*, Section 332(c)(7) is an "express jurisdictional limitation[] on FCC power" that "fences off" State and local authorities "from FCC reach or regulation," except as specifically provided in the statute. 476 U.S. at 370.

The legislative history confirms Congress's purpose. The House of Representatives initially had passed language empowering the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). The bill directed the FCC to adopt "policies" requiring a local government to act "within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.* Congress, however, "ultimately rejected the national approach" and instead adopted the current Section 337(c)(7) – "a system based on cooperative federalism." *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring). Congress revised the statute's language to retain many of the House bill's limitations, but changed how they would be implemented: it struck all references to FCC "policy," and instead inserted a private right of action. 47 U.S.C. § 332(c)(7)(B)(v). The Conference Report accordingly directed the FCC to "terminate[]" its rulemakings, Pet. App. 209a, and confirmed that the statute establishes "limitations

on the role and powers of the Commission . . . relate[d] to local land use regulations." H.R. Rep. No. 104-458 (1996) (Conf. Rep.) at 207-08, Pet. App. 211a.

Moreover, Congress gave no hint that when it required State and local action within a "reasonable period of time . . . taking into account the nature and scope of such request," 47 U.S.C. § 332(c)(7)(B)(ii), that it intended to create national, presumptively binding deadlines for a particular industry. To the contrary, the legislative history reveals that Congress deliberately chose not to create fixed *federal* standards, but instead to prevent State and local governments from applying their *local* standards differently in this setting:

> If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

Pet. App. 210a.

A *de novo* standard would permit a court to adopt the best reading: that Congress did not empower the FCC to structure Section 332(c)(7) around national, administrative policy. A deferential standard on this jurisdictional question resulted in the Fifth Circuit allowing the FCC to use statutory am-

biguity to create a regulatory scheme that Congress specifically rejected.

* * *

Therefore, to decide this case, it is sufficient for this Court to hold that the Fifth Circuit erred by not determining *de novo* whether Congress intended to delegate to the FCC the power to issue its supposedly binding interpretation of Section 332(c)(7). This Court accordingly can vacate the judgment below and remand for the court of appeals to conduct the appropriate *de novo* inquiry.

III. The Court Of Appeals Should Have Presumed That Congress Did Not Delegate Interpretive Jurisdiction Over Section 332(c)(7) To The FCC.

If this Court instead elects to go further, it should either apply a *de novo* standard itself and hold that Congress did not intend for the FCC to adopt binding rules interpreting Sections 332(c)(7) or instruct the court of appeals that it may not adopt the FCC's jurisdictional determination without first finding a clear indication from Congress that it intended the agency to assume authority in this area. *Cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (reviewing *de novo* and with presumptions against preemption the meaning of "any entity" under 47 U.S.C. § 253, despite FCC adjudication interpreting statute); *Solid Waste Agency of N. Cook County ("SWANCC") v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001).

A. Congress Was Required To Speak With Particular Clarity If It Wished To Grant The FCC Authority To Adopt Rules Implementing Section 332(c)(7).

1. As shown, *supra*, the best *de novo* reading of Section 332(c)(7) is that the FCC lacks the authority to implement it. Any doubt in that regard is resolved by application of well-recognized statutory presumptions that require clear statements of delegation in certain circumstances. While this Court has recognized that the Communications Act generally gives the FCC broad authority to interpret provisions within the Act, *Gonzales*, 546 U.S. at 258-59, that rule is not absolute, as the courts and the agency itself have generally recognized. The FCC is given broad authority over communications by wire and radio, and over entities that communicate by wire, 47 U.S.C. § 152, but not over public or private property, or over State or local governments generally. The agency, therefore, concluded that it did not have authority to regulate attachments to facilities essential to communications absent a more specific grant of authority from Congress. *California Water & Power Co.*, 64 F.C.C.2d 753, 759 (FCC 1977) (citing *Ill. Citizens Committee for Broad. v. FCC*, 467 F.2d 1397 (7th Cir. 1972)). Congress itself has historically limited FCC authority to regulate State and local property (47 U.S.C. § 224) and historically limited FCC interference with intrastate regulation, *Louisiana PSC*, 476 U.S. at 374-75.

2. Here, the Fifth Circuit recognized that Section 332(c)(7) begins with jurisdiction-limiting language, albeit language that the court found ambiguous. But

that very ambiguity should have led the court to presume that Congress did not intend to give the FCC authority to regulate zoning. *Louisiana PSC* is illustrative. It involved a preservation clause stating that "except as provided" in certain sections, "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" certain matters related to intrastate service. *See* 476 U.S. at 370. The FCC argued that the clause should be construed to preserve State authority only as to intrastate matters that were separable from interstate communication. The Court disagreed, noting that, although State regulations may be displaced to the extent that they obstruct the objectives of Congress, the statute at issue "constitutes . . . a congressional *denial* of power to the FCC." *Id.* at 374. The Court recognized that a delegation of authority to an agency cannot be implied in such circumstances: "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." *Id.* at 374-75.

3. The rule in *Louisiana PSC* rests upon broader federalism principles that apply whenever a statutory interpretation question implicates the historic federal-state balance. This Court has long recognized an "'assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria Group Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alteration in original). That assumption "applies with particular force

when Congress has legislated in a field traditionally occupied by the States." *Id.*

This Court has accordingly held, in a variety of contexts, that courts may not adopt a statutory interpretation abrogating traditional State authority absent a clear statement from Congress that it intended that result. *See, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" (internal quotation marks omitted) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))); *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *SWANCC*, 531 U.S. at 172-73; *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

Finding that the FCC has interpretive jurisdiction over Sections 332(c)(7) – and thus the power to implement zoning policies binding on States and localities – would trigger these very concerns. The subject matter of Section 332(c)(7) – local land use – is manifestly an area of traditional State regulation. The FCC has no experience in managing zoning. Indeed, just before Congress enacted this statute, the FCC explained that it "traditionally has been reluctant to become embroiled in zoning matters, believing that such issues are within the province of, and best resolved by, local land use authorities." *In re Artichoke Broad. Co.*, 10 FCC Rcd. 12631, 12633

(1995).

Congress did mean to limit local authority to discriminate against wireless providers, but it also did not wish to replace local zoning standards with a national zoning process. That the FCC's jurisdictional claim would displace State and local authority over local land use processes is clear from the Declaratory Ruling itself. Under that policy, if a State or local government does not release its decision on a siting application within the 90- or 150-day deadlines (without extension by mutual agreement), its decision automatically constitutes a "failure to act" and is presumptively an unreasonable "period of time" on the merits. Pet. App. 115a . Unless the applicant agrees otherwise, this forces the State or local government into court on an expedited timetable, requiring it to expend resources to defend its action, even if the time was necessary to comply with other binding obligations (such as State environmental laws) or to implement policies reflected in the State's or locality's own deadlines. Moreover, because these rules apply only to applications for personal wireless service facilities, a State or locality wishing to avoid litigation must give precedence and special treatment to wireless applicants at the expense of other zoning applicants and policies. That is to say, allowing the FCC to implement Section 332(c)(7) both "limits" and "affects" local authority in a fundamentally different way than court review of individual zoning decisions. Given the intrusion on traditional local authority, FCC jurisdiction cannot be presumed from ambiguous statutory language. The Fifth Circuit was required to apply this principle in construing Sections 332(c)(7).

4. The Fifth Circuit should have concluded that Congress did not empower the FCC to authoritatively interpret "failure to act" in Section 332(c)(7)(B)(v) for an independent reason: Congress committed the language in this private right of action to the courts.

As explained above, Congress rejected a model that would have established limits on State and local authority through a general FCC "policy." It replaced it with a regime rooted in judicial review, through cases brought under a private right of action. The FCC now seeks to restore the primacy of FCC policy by defining this private cause of action. The FCC may not do so. As in *Adams Fruit*, "even if . . . language establishing a private right of action is ambiguous, we need not defer" to the FCC's reading of it "because Congress has expressly established the Judiciary and not the [FCC] as the adjudicator of private rights of action arising under the statute." 494 U.S. at 649. Here, the FCC openly acknowledged that it sought to define the "statutory trigger for seeking judicial relief," and that that its goal was to allow providers to "more vigorously" enforce the statute in court. Pet. App. 106a. This judicial matter, however, is well beyond the FCC's domain. Because Congress "established an enforcement scheme independent of the [FCC] . . . . it would be inappropriate to consult [FCC interpretations] to resolve ambiguities surrounding the scope of [Section 332(c)(7)'s] judicially enforceable remedy." *Adams Fruit*, 494 U.S. at 650.

In sum, because the FCC's claim of authority to implement Section 332(c)(7)(B) would encroach on

matters that Congress left to State and local governments, and to the courts, the court of appeals had ample grounds to require a clear delegation of authority. Not only was there no such delegation, but Section 332(c)(7)'s text and history in fact point in the opposite direction, with one exception: Section 332(c)(7) was included in the Communications Act. Pet. App. 39a. That was not sufficient. *See* Part III.B, *infra*. The FCC's substantive interpretations were at most entitled to consideration under *Skidmore*.

B. There Is No Reason To Conclude That Congress Delegated Interpretive Authority To The FCC Here.

To be sure, Congress does delegate interpretive authority to agencies, often under circumstances where there is little or no reason to believe that Congress would not intend it. But this is not such a case.

1. Courts have little trouble determining that Congress intended an agency to have interpretive jurisdiction over a particular statute when Congress says so expressly. Similarly, as the Court recognized in *Gonzales*, it may be easier to find that Congress implicitly intended an agency to interpret a provision that is included within a comprehensive statute that grants an agency broad, general authority. 546 U.S. at 258. To be sure, the Communications Act is such a measure. *Id.* Because of this, when Congress adds a provision to the Act – without more – the addition alone may imply a delegation. *AT&T*, 525 U.S. at 377. But when "statutory provisions. . . displace the Commission's general rulemaking author-

ity," this implication falls away. *Id.* at 385.

Within Section 332(c)(7) itself, Congress did not grant the FCC general interpretive jurisdiction: the statute empowers the FCC to address only a single issue, RF emissions. 47 U.S.C. § 332(c)(7)(B)(iv). Likewise, there is no express delegation of interpretive jurisdiction over Sections 332(c)(7) in any other provision of the Communications Act. The FCC contends that it has the power to implement Section 332(c)(7)(B) pursuant to 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r). These provisions, with slight variations, generally permit the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). That generalized grant of authority, however, cannot override the specific terms of Section 332(c)(7)(A), which preserves State and local zoning authority against federal regulation "[e]xcept as provided *in this paragraph*." 47 U.S.C. § 332(c)(7)(A) (emphasis added); *see AT&T*, 525 U.S. at 385; *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("'[I]t is a commonplace of statutory construction that the specific governs the general.' That is particularly true where . . . 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" (alteration in original) (citations omitted)). This exception to the general rule – *i.e.*, that "nothing in this Act" may "limit" or "affect" State or local authority – must be read narrowly. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). Nor do Sections 1, 4(i), 201(b), and 303(r) of the Communications Act provide anything approaching the "'clear and manifest'"

statement of congressional intent required to overcome the presumption against delegation in this case. *Bates*, 544 U.S. at 449 (citation omitted).

"[W]here one has doubt that Congress actually intended to delegate interpretive authority to the agency (an 'ambiguity' that *Chevron* does not presumptively leave to agency resolution)," *Chevron* deference does not apply. *Christensen*, 529 U.S. at 597 (Breyer, J., dissenting). This requirement that Congress give some affirmative indication of its intention to delegate interpretive jurisdiction to an agency is the natural outgrowth of *Chevron*'s status as a doctrine fundamentally rooted in congressional intent. *See* Merrill & Hickman, *supra*, at 872 ("In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is . . . important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority."). The decision of the court of appeals decision is squarely refuted by these precedents.

2. There may be cases where a statute's subject matter so plainly requires agency expertise that jurisdiction may be implied from imprecise delegations. This, however, is certainly not a case in which Congress can be presumed to have intended for the agency to have final interpretive authority because of the need for an "expert policy judgment" in a subject area that is "'technical, complex, and dynamic.'" *Brand X*, 545 U.S. at 1002-03 (quoting *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)); *see Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52

(1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). As noted above, the FCC has no expertise over State and local zoning matters. Likewise, whether Congress intended to delegate to the FCC final interpretive authority over Sections 332(c)(7) is a pure legal question that does not touch on the FCC's technical expertise in communications matters. Rather, expertise in deciding questions of jurisdiction and congressional intent lies with courts, not agencies. *See* Sales & Adler, *supra*, at 1535 ("However much expertise agencies may have at answering technical or policy questions, they have no institutional advantage over courts in resolving jurisdictional disputes.").

3. There may also be cases where there is such an evident need for a national standard that it can be implied that Congress intended an agency to implement the statute. This case presents no such circumstance. Far from contemplating a single timing standard, Section 332(c)(7) is specifically designed to require courts to evaluate challenged delays on a case-by-case basis, taking into account local conditions and giving deference to the expertise of local zoning officials. That is in fact precisely how the statute was understood to operate during the twelve years between its enactment and the issuance of the Declaratory Ruling. *See, e.g., Omnipoint Communications*, 173 F.3d at 17 (describing statute as a "refreshing experiment in federalism" that "does not offer a single 'cookie cutter' solution for diverse local situations" but instead contemplates "individual solutions best adapted to the needs and interests of particular communities"). More importantly, such a

view comports with the will of Congress, which directed courts to apply the "reasonable period of time" requirement by examining the "usual period" established by State and local zoning experts, H.R. Rep. No. 104-458, at 207-08 (1996), Pet. App. 210a, not by looking to the FCC for guidance.

* * *

In sum, the court of appeals should not have applied *Chevron* to review the FCC's interpretation of its own statutory jurisdiction. The court instead should have answered *de novo* the preliminary jurisdictional question of whether Congress delegated to the FCC final interpretive authority over Sections 332(c)(7)(A) and (B)(v). In conducting that inquiry, the court should have applied traditional canons of statutory construction, including the presumption that Congress does not intend to expand agency jurisdiction into areas of traditional State and local regulation.

CONCLUSION

The Court should reverse the court of appeals' judgment, or vacate that judgment and remand the case.

Respectfully submitted,

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November 19, 2012

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

NOV 1 9 2012
OFFICE OF THE CLERK

NOS. 11-1545 & 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents;

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; NATIONAL LEAGUE OF CITIES; UNITED STATES CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES; CITY OF CARLSBAD, CALIFORNIA; AND CITY OF DUBUQUE, IOWA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Telecommunications Act of 1996 preserves state and local zoning authority over "the placement, construction, and modification of personal wireless service facilities," except for a short list of narrow limitations set forth in the text of the Act. 47 U.S.C. § 332(c)(7)(A). With one exception not implicated in this case, Congress granted the federal courts, rather than the Federal Communications Commission, authority to resolve violations of the Act's narrow limitations on state and local authority. Yet, the Commission ruled that it has jurisdiction to promulgate requirements for state and local zoning decisions under the Act. The court below deferred to the Commission's assertion of jurisdiction under *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984), and upheld the agency's ruling. This Court granted certiorari limited to the following question:

Whether a court should apply *Chevron* to review an agency's determination of its own jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners the City of Arlington, Texas, and City of San Antonio, Texas were the petitioners in the court of appeals below. Petitioners Cable and Telecommunications Committee of the New Orleans City Council; City of Los Angeles, California; County of Los Angeles, California; County of San Diego, California; and Texas Coalition of Cities for Utility Issues were intervenors in support of petitioners in the court below.

Respondents International Municipal Lawyers Association; National Association of Telecommunications Officers and Advisors; National League of Cities; United States Conference of Mayors; National Association of Counties; City of Carlsbad, California; and City of Dubuque, Iowa were intervenors in support of petitioners in the court below.

Respondents United States of America and Federal Communications Commission, were the respondents in the court below. Respondents CTIA—The Wireless Association and Cellco Partnership were intervenors in support of respondents in the court below.

RULE 29.6 STATEMENT

Respondents International Municipal Lawyers Association; National Association of Telecommunications Officers and Advisors; National League of Cities; United States Conference of Mayors; National Association of Counties are nongovernmental corporations, with no parent corporations and no stock. Respondents City of Carlsbad, California, and City of City of Dubuque, Iowa, are governmental entities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a–68a) is reported at 668 F.3d 229. The order of the court of appeals denying rehearing (Pet.App.196a–97a) is not reported in the Federal Reporter. The Federal Communications Commission's Declaratory Ruling (Pet.App.69a–171a) is reported at 24 FCC Rcd. 13994 (Nov. 18, 2009), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010) (Pet.App.172a–95a).

JURISDICTION

The court of appeals entered its judgment on January 23, 2012, and entered an order denying petitions for rehearing *en banc* on March 29, 2012. A petition for certiorari was timely filed and granted on October 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 332(c)(7) of the Communications Act of 1934, 47 U.S.C. § 332(c)(7), provides:

Preservation of local zoning authority.

(A) General authority. Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless

service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is

inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions. For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) [47 U.S.C. § 303(v)].

INTRODUCTION

This Court granted certiorari to consider a question that squarely implicates the horizontal separation of powers at the federal level. But this case also involves the other fundamental structural protection in our Constitution: the vertical separation of powers between the federal government and state and local governments. Both of the Constitution's basic structural protections underscore

that the FCC is not entitled to deference in asserting its own jurisdiction at the expense of state and local governments.

That conclusion follows directly from two lines of this Court's precedents. First, as a matter of the horizontal separation of powers, agencies are not entitled to deference in interpreting the bounds of their statutory authority, which is the only thing that entitles them to deference in the first place. This principle flows directly from this Court's seminal decision in *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984), and the long line of cases applying *Chevron*'s framework. An agency is entitled to *Chevron* deference only when "Congress delegated authority to the agency generally to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The determination of an agency's jurisdiction is thus necessarily antecedent to *Chevron* deference. It is only the conclusion that the agency possesses delegated statutory authority that entitles the agency to *Chevron* deference. Thus, an agency is not entitled to any deference in reaching the conclusion that it possesses jurisdiction. The question whether Congress has, in fact, delegated an agency jurisdiction to act with the force of law has always been reserved to the courts. It should remain so.

Second, the inappropriateness of deference when a federal agency expands its jurisdiction at the expense of state and local governments flows directly from *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991),

and related cases demanding a clear indication of congressional intent to displace state and local authority. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. For that reason, when Congress seeks to alter traditional state or local authority, "it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Because agencies are entitled to *Chevron* deference only in the event of statutory *ambiguity*, and *Gregory* demands *clarity* before state and local authority is displaced, there is simply no room for deference on questions that implicate state and local power. Agency interpretations of their grants of jurisdiction to displace state and local authority are entitled to their persuasive force, but nothing more.

STATEMENT OF THE CASE

A. The Telecommunications Act of 1996 and the Protection of State and Local Zoning Authority

Section 332(c)(7) of the Telecommunications Act of 1996 broadly preserves local zoning authority over siting applications concerning wireless service facilities, subject to a narrow set of statutory requirements. *See* 47 U.S.C. § 332(c)(7) (entitled "Preservation of local zoning authority"). Subsection (A) of the Act states: "Except as provided in this

paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." § 332(c)(7)(A).

Subsection (B) provides a narrow set of exceptions to subsection (A)'s general rule. Under these "[l]imitations," state and local governments must "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed ..., taking into account the nature and scope of such request." § 332(c)(7)(B)(ii). In addition, state and local zoning authorities may not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." § 332(c)(7)(B)(i). And the Act mandates that the denial of any such request must be "in writing and supported by substantial evidence contained in a written record." § 332(c)(7)(B)(iii).

The Act is not silent as to which government body is to "hear and decide" disputes under these provisions. It specifically provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government ... that is inconsistent with [47 U.S.C. § 332(c)(7)(B)] may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." § 332(c)(7)(B)(v). The Act provides no similar grant of authority to the FCC.

The FCC does, however, possess statutory jurisdiction over a single, narrow issue: the

environmental effects of radio frequency emissions. The Act denies state and local authorities the power to "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." § 332(c)(7)(B)(iv). Any person aggrieved under this provision "may petition the Commission for relief." § 332(c)(7)(B)(v).

The court below acknowledged that the Act "seeks to reconcile two competing interests." Pet.App.4a. The first is "Congress's desire to preserve the traditional role of state and local governments in regulating land use and zoning." *Id.* The second is "Congress's interest in encouraging the rapid development of new telecommunications technologies." *Id.* And the Act's "comprehensive" structure achieves this balance by setting the default rule in subsection (A), that state and local governments generally retain local zoning authority, subject only to the narrow "[l]imitations" on local authority in subsection (B) and subject to expedited judicial review of any disputes. *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (Stevens, J., concurring); *id.* at 129 (Breyer, J., concurring).

The Act's legislative evolution also reflects this careful balance of local and national interests. The first iteration of section 332(c)(7) adopted by the House of Representatives would have granted the FCC broad jurisdiction to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or

operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). Among other things, the House version would have given the FCC power to "ensure that ... a State or local government ... shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.*

But Congress did not adopt this broad grant of regulatory power. The conference committee "rejected the national approach" proposed in the House bill and "substituted a system based on cooperative federalism." *Rancho Palos*, 544 U.S. at 128 (Breyer, J., concurring).[1] Thus, rather than granting the FCC jurisdiction to "prescribe and make effective a policy regarding State and local regulation of ... facilities for the provision of commercial mobile services," H.R. Rep. No. 104-204, at 25, the final Act expressly preserves state and local authority over zoning matters, *see* 47 U.S.C. § 332(c)(7)(A). The conference report explained that, aside from the single, narrow issue of radio frequency emissions, which was delegated to the FCC, "the courts shall have exclusive jurisdiction over all other disputes

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[1] *See also* H.R. Conf. Rep. No. 104-458, at 207–08, 1996 U.S.C.C.A.N. 10 (1995) ("The conference agreement creates a new Section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.").

arising under" section 332(c)(7). Further, the report instructed that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile radio service] facilities should be terminated." H.R. Conf. Rep. No. 104-458 at 208, 1996 U.S.C.C.A.N. 10 (1995).

B. The FCC's Jurisdictional Ruling

For over a decade, the FCC asserted no regulatory jurisdiction under section 332(c)(7), other than to regulate radio frequency emissions. Disputes about timing and related matters were decided by the courts, "taking into account the nature and scope of [each] request." 47 U.S.C. § 332(c)(7)(B)(ii). As Judge Boudin aptly summarized the landscape: "Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law." *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

Eventually, though, telecommunications carriers sought relief, and not from Congress. Instead, in 2008, Respondents CTIA–The Wireless Association filed a petition with the FCC requesting, among other things, "that the Commission issue a Declaratory Ruling" setting "timeframes in which zoning authorities must act on siting requests for wireless towers and antenna sites." Pet.App.71a. CTIA specifically asked the FCC to mandate a 45-day time limit for applications "proposing to collocate on

an existing facility"[2] and a 75-day limit for "non-collocation wireless siting application[s]." *Id.* at 77a. CTIA further proposed that, when a local zoning authority does not act within these deadlines, the siting request should be "deemed granted" or, alternatively, the application should be presumptively entitled to "a court-ordered injunction granting the application unless the zoning authority can justify the delay." *Id.* CTIA also asked the FCC to rule that the Act prohibits local authorities from denying a siting application "based on one or more carriers already serving the geographic area." *Id.* at 78a. A number of wireless providers supported CTIA's petition, while state and local governments opposed it.

Before reaching the merits of the industry's requests, the FCC separately addressed the scope of its own jurisdiction. CTIA and the wireless providers argued that the Commission possessed jurisdiction to issue the requested rules. State and local governments, including some of respondents here, argued "that the statutory text and the legislative history [of section 332(c)(7)] evince congressional intent to deny the Commission such authority." *Id.* at 85a. The Act "withheld preemptive authority from the Commission," they argued, by "expressly preserving State and local government authority over personal wireless service facility siting decisions" and by providing that "the courts have exclusive jurisdiction over all disputes arising under Section

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[2] "Collocations involve modifications to already existing wireless facilities." Pet.App.8a. n.9.

332(c)(7) (except for those relating to RF emissions)." *Id.* at 85a–86a. The state and local authorities also highlighted the conference report's instruction that the FCC terminate all pending rulemaking on the topic as further evidence supporting the conclusion that the FCC lacks regulatory jurisdiction under section 332(c)(7).

The FCC determined that it has jurisdiction to issue the requested rules under the Act. It began with the observation that "Congress delegated to the Commission the responsibility for administering the Communications Act." *Id.* at 87a. Then, it cited broad delegations of FCC authority in sections 1, 4(i), 201(b), and 303(r) of the Communications Act. "These [general] grants of authority," the Commission reasoned, "necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular." *Id.* at 88a. The Commission interpreted the Act and its legislative history as prohibiting "a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7)." *Id.* at 90a. And it concluded its rules do not constitute "the imposition of new limitations," but "merely interpret[] the limits Congress already imposed on State and local governments." *Id.* at 90a. The Commission also held that "the fact that Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7)." *Id.* at 92a.

Upon reaching the merits, the FCC granted the petition in part. The Commission granted the industry's request for time limits on local zoning authorities' processing of siting applications, but it considered the proposed time limits "insufficiently flexible for general applicability." *Id.* at 114a. Instead, the FCC set a 90-day time limit for collocation applications and a 150-day time limit for non-collocation applications. *Id.* at 115a. Under the FCC's ruling, these time limits, and thus the statutory 30-day deadline for seeking judicial relief following the denial or failure to act on an application, may be tolled "by mutual consent of the personal wireless service provider and the State or local government." *Id.* at 120a. The time limits do not begin running until an application is complete, and if an application is incomplete, zoning authorities must notify the applicant within 30 business days after submission. *Id.* at 124a. The FCC also concluded "that a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation" under section 332(c)(7)(B)(i)(II) of the Act. *Id.* at 127a.

The FCC did not adopt CTIA's suggestion that an application should be "deemed granted" when a zoning authority fails to act within the FCC time limits. Rather, the Commission provided that "State or local authorit[ies] will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Id.* at 112a. Yet, the Commission was clear that its time limits trump any contrary state or

local deadlines, thus allowing suits even where state or local law would grant a zoning authority more than 90 or 150 days to reach a decision. *Id.* at 121a.

The FCC denied a petition for reconsideration, and the City of Arlington timely filed a petition for review in the United States Court of Appeals for the Fifth Circuit. *Id.* at 10a. Respondents in support of petitioners successfully moved to intervene in the court of appeals. *See id.* at 11a; Order Granting Motion to Intervene (Jan. 7, 2011) [CA Doc. No. 00511345715].

C. The Decision Below

The Fifth Circuit upheld the FCC's jurisdictional determination. Critically, the court reached that conclusion by applying circuit precedent holding that agencies are entitled to *Chevron* deference even when deciding questions of their "own statutory jurisdiction." Pet.App.37a.

Without separately addressing whether "Congress delegated authority to the agency generally to make rules carrying the force of law" regarding local zoning applications, *Mead*, 533 U.S. at 226–27, the court proceeded directly to the question of whether section 332(c)(7) is ambiguous as to the FCC's jurisdiction, *see Chevron*, 476 U.S. at 843. Pet.App.40a. The court noted the FCC's general rulemaking authority under the Communications Act, *id.* at 39a–40a, then concluded that section 332(c)(7) is silent on whether the FCC may exercise its general authority to "implement" the specific limitations set forth in section 332(c)(7)(B), *id.* at 41a, 45a. In the court's view, "Congress did not

clearly remove the FCC's ability to implement the limitations set forth in section 332(c)(7)(B)" and thus the Act leaves the scope of the Commission's authority ambiguous—despite the Act's grant of exclusive jurisdiction to the courts. *Id.* at 42a–43a (holding that section 332(c)(7)(b)(v) "does not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act").

Having found the Act ambiguous as to the FCC's jurisdiction over local zoning decisions, the court addressed whether the Commission's assertion of jurisdiction was reasonable under step two of the *Chevron* analysis. *First*, the court held that the Act's legislative history does not conclusively foreclose the FCC's jurisdictional assertion. That "legislative history," in the court's view, "is silent as to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) expressly imposes on state and local governments." *Id.* at 47a.

Second, the court rejected the suggestion that the FCC's determination conflicts with the "clear statement" rule set forth in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) and related cases. The court acknowledged that, "if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute." Pet.App.48a (internal quotations and citations omitted); *see also Gregory*, 501 U.S. at 460. But the court reasoned that section 332(c)(7)(B) clearly

preempts state zoning laws and the FCC's ruling "only further refines the extent of the preemption that Congress has already specifically provided." Pet.App.49a.

Third, the court held that the FCC had not departed from its prior conclusion that it lacks jurisdiction over local zoning matters. The court read the Commission's prior decisions as disclaiming jurisdiction to resolve specific disputes, a power the statute expressly vests in the courts, not as disclaiming general rulemaking authority under the Act. *See id.* at 51a. The court therefore held that the FCC's interpretation of its own jurisdiction was reasonable and entitled to *Chevron* deference.

The court of appeals denied a request for rehearing *en banc*, *id.* at 196a, and this Court granted review limited to the deference question.

SUMMARY OF ARGUMENT

The two fundamental protections of our constitutional structure preclude *Chevron* deference in this case. The separation of powers at the federal level requires that Congress set the limits of agency jurisdiction and that the courts conclusively interpret and enforce those limits without an agency's thumb on the scale. The basic metes and bounds of the agency's jurisdiction must be ascertained as a straightforward matter of statutory construction. It is not reasonable to conclude that Congress would intend to grant an agency deference to interpret the scope of its own deference. Only once an agency's jurisdiction is established does deference serve, rather than threaten, the separation of powers. And

deference is especially inappropriate when an agency's jurisdictional assertion raises federalism concerns by intruding on state or local authority. Proper respect for our constitutional structure demands that Congress act unambiguously before courts will infer a grant of federal authority to displace state and local law. As deference comes into play only in the context of ambiguous laws, this Court's clear statement rules leave no room for deference when an agency expands its jurisdiction at the expense of state and local governments.

I. Agencies may act only pursuant to statutory delegations of authority. They possess no inherent authority; nor can they grant unto themselves any executive power. Their jurisdiction to exercise the executive power derives solely from—and extends only so far as—Congress' exercise of the legislative power. And it has always been the unique province of the judiciary to police those bounds. The judicial duty to protect against *ultra vires* government action is as old as the Republic. Just as the judiciary is needed to prevent Congress from exceeding its constitutional limits, the courts provide an essential check against agency attempts to breach the bounds of congressionally delegated power. Thus, a proper understanding of separation of powers principles precludes courts from affording *Chevron* deference to an agency's claim of regulatory jurisdiction. Any contrary understanding would encourage agencies to arrogate to themselves virtually unchecked coercive power.

These principles comport with the theory of the *Chevron* doctrine. *Chevron* requires that courts defer

to an agency's reasonable interpretation of ambiguity in a statute the agency is entrusted to administer. But it is the fact of congressional delegation of authority that entitles an agency to deference. In other words, *Chevron* deference is premised on the necessary precondition that Congress has granted the agency authority to administer the statute being construed. It is that premise that makes the assumption of congressional intent to delegate interstitial rulemaking authority reasonable. This Court conclusively affirmed that principle in *Mead*, when it held that an agency interpretation "qualifies for *Chevron* deference" only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" on the statutory subject. 533 U.S. at 226–27. The question of jurisdiction is therefore necessarily anterior to any application of deference.

It would make nonsense of *Chevron*'s logic to grant an agency deference on the very question of whether it is entitled to deference. Without the premise that Congress has, in fact, granted the agency jurisdiction over a particular subject, *Chevron* provides no basis for deference. One cannot simply assume the proverbial can opener or adopt the principle that Congress intends that "close counts" when it comes to granting agencies jurisdiction. Thus, any theory of granting deference to agencies' determinations of their own jurisdiction must be derived from first principles, not from rote citation to *Chevron*, which itself derived its deference principle from the very issue in dispute here, namely whether Congress granted the agency authority in the first place. And a resort to first principles certainly does

not support a rule of deference or a presumption in favor of finding delegation in ambiguous statutes. Rather, first principles suggest that if the courts are to engage in anything other than a straight-up exercise in statutory construction, they should indulge a liberty-preserving presumption that the delegation of power from relatively accountable legislators to relatively unaccountable executive branch administrators is to be disfavored.

Nor do *Chevron*'s twin practical rationales—that the interpretation of substantive provisions in a regulatory statute typically entails the accommodation of competing policy perspectives and that expert agencies are better suited to implement technical and complex regulatory regimes—carry any weight in the context of jurisdictional determinations. Courts are better suited than agencies to probe the bounds of congressional intent when it comes to the agency's own jurisdiction. Courts have the virtue of being disinterested, whereas agencies have a self-serving tendency to view their own jurisdiction favorably, much the way a hammer sees all hardware as nails. Moreover, purely legal questions of jurisdiction lie at the core of judicial expertise and rarely implicate policy judgments or technical expertise.

Indeed, the case against deference when it comes to an agency's conception of its own jurisdiction is so strong, the only real objection could be one of administrability. But this is hardly an impossible line to draw. Jurisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and

under what conditions. Substantive interpretations entitled to *Chevron* deference concern the *how* of regulatory power: in what fashion may an agency implement an administrative scheme. Indeed, the FCC had no trouble drawing the line in this case. It separately addressed the threshold question of whether it could regulate local zoning decisions, *before* turning to the merits of its regulations. The agency clearly indicated when it was defining the limits of its own jurisdiction and when it was applying its (claimed) authority to implement the Act. *Chevron* just as clearly concerned a substantive application of the Clean Air Act, not an examination of the Environmental Protection Agency's unquestioned authority to regulate state permitting processes for new "stationary sources" of air pollution.

II. *Chevron* deference is particularly unwarranted when an agency claims power over matters of traditional state and local concern. Just as the horizontal separation of powers protects against the accumulation of all federal authority in the hands of a single branch, federalism ensures a vertical division of power among separate sovereigns. Both principles safeguard individual liberty and due process. For that reason, this Court requires an unmistakably clear statement from Congress before interpreting federal law to displace state and local power. *See, e.g.*, *Gregory*, 501 U.S. at 458. And that rule applies to an agency's assertion of preemptive power to displace state or local regulatory authority. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

The clear statement rule of *Gregory* and related cases forecloses *Chevron* deference on matters of agency jurisdiction vis-à-vis state and local governments. The two doctrines are fundamentally at odds. The clear statement rule requires congressional *clarity* to authorize federal encroachment, while *Chevron* turns on *ambiguity*. There is thus no room for deference to an agency's claim to derive preemptive regulatory power from an ambiguous statute. The courts must resolve the question whether Congress has acted with sufficient clarity to disrupt the federal-state balance. If not, the agency is not authorized to fill the gap or augment its own authority at the expense of state and local governments.

None of this is to say that an agency's view of its statutory power is irrelevant. When *Chevron* deference does not apply, the courts afford an agency's interpretation respect according to its power to persuade. That is as it should be. An agency's familiarity and experience with a statutory scheme warrant due consideration. But an unpersuasive agency view as to its own jurisdiction should not carry the day. When it comes to the fundamental jurisdictional question that justifies a doctrine of administrative deference in the first place, it is only the courts that may discern the legislative intent to confer executive authority or disrupt the federal-state balance—as our Constitution requires.

ARGUMENT

I. An Agency's Assertion of Jurisdiction Is Not Entitled to *Chevron* Deference.

The *Chevron* doctrine provides no basis for deferring to an agency's assertion of jurisdiction. An agency's actual, not asserted, statutory jurisdiction is the doctrinal basis for *Chevron* deference in the first place. Deference makes sense precisely and only because Congress granted authority to the agency. Thus, assessment of the metes and bounds of that jurisdiction necessarily precedes any deference, and agencies cannot logically receive deference on the question of whether they have a statutory basis to receive deference. If there is to be any presumption about whether grants of regulatory authority are to be construed broadly or narrowly or with or without deference, it must come from first principles rather than from *Chevron* itself. And if courts are going to apply any presumption, it should be the liberty-preserving presumption that delegations of authority from relatively accountable legislators to relatively unaccountable executive agencies are to be disfavored. The contrary presumption that ambiguous grants of authority should be construed to delegate authority, at least when the agency wants that authority, has little to recommend it. Agencies possess no comparative policy or technical advantage over courts when assessing regulatory jurisdiction. To the contrary, the disinterested courts are far better suited to determine the reach of congressional delegation.

A. The *Chevron* Doctrine Does Not Permit Judicial Deference to an Agency's Assertion of Jurisdiction.

1. The question of an agency's statutory jurisdiction is antecedent to *Chevron* deference. Indeed, the presumed fact of agency jurisdiction is the *raison d'etre* of deference. For over a decade, this Court has held that an agency is not entitled to *Chevron* deference unless "Congress delegated authority to the agency generally to make rules carrying the force of law." *Mead*, 533 U.S. at 226–27; *see also Gonzalez v. Oregon*, 546 U.S. 243, 258–68 (2006) (refusing to grant *Chevron* deference where the Attorney General lacked statutory authority to prohibit doctors from prescribing controlled substances for assisted suicide). The rule could hardly be otherwise. The rationale for *Chevron* deference depends on the fact of congressional delegation of jurisdiction to the agency to regulate the relevant subject matter. Thus, applying *Chevron* deference to the question whether an agency has the jurisdiction that justifies *Chevron* deference is the jurisprudential equivalent of assuming the can opener.

This Court has long recognized as much. Well before *Mead*, this Court squarely held that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990). Indeed, this Court was clear in *Chevron* that deference applies only "[w]hen a court reviews an agency's construction of [a] statute *which it administers*." *Chevron*, 467 U.S. at 842 (emphasis

added); *see also id.* at 844. Thus, ever since *Chevron* courts have "defer[red] to the 'executive department's construction of a statutory scheme it is *entrusted to administer*,'" but not to the construction of statutory schemes *not* entrusted to an agency's administration. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (quoting *Chevron*, 467 U.S. at 844) (emphasis added); *see also* Thomas W. Merrill & Kristen E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.") (cited approvingly in *Mead*, 533 U.S. at n.11).

The courts have always been the branch to resolve the threshold question of which agency administers which questions. Take *Mead* as an example. This Court did not defer to the Customs Service on whether "Congress meant to delegate authority to [the agency] to issue classification rulings with the force of law." 533 U.S. at 231–32. Rather, it tackled the question as it would any other matter of statutory construction. That *judicial* inquiry probed for statutory indications of whether "*Congress* would expect the agency to be able to speak with the force of law" on tariff classifications. *Id.* at 229 (emphasis added); *see also id.* (explaining that "a very good indicator of delegation meriting *Chevron* treatment i[s] *express congressional authorizations* to engage in the process of rulemaking or adjudication" (emphasis added)). The judicial answer was no, and so this Court held that *Chevron* did not apply.

Thus, as a basic matter of doctrinal coherence, *Chevron* does not apply to an agency's assertion of regulatory jurisdiction in the first place. Before employing *Chevron* deference, the courts must answer the statutory question whether Congress intended an agency to receive *Chevron* deference as a matter of straight-up statutory construction. Under *Mead*, the inquiry turns on whether Congress granted an agency authority to act with the force of law over the subject matter at issue. And that question essentially reduces to whether the agency has regulatory jurisdiction in the first place. *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1528 (2009) ("In determining the nature of the delegation to an agency, courts are essentially determining the scope of an agency's power—i.e., the scope of agency jurisdiction.").

2. Neither do *Chevron*'s subsidiary rationales support deference on jurisdictional matters. Deference under *Chevron* rests on the view that "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." 467 U.S. at 843 (internal quotation marks and alterations omitted).

This Court has identified two subsidiary reasons that Congress would want to delegate discretion to an agency to fill interstitial gaps in statutes within the agency's jurisdiction. First, these interpretive choices typically implicate important regulatory

policies. *See Chevron*, 467 U.S. at 844, 865. And "accommodation of conflicting policies" is a task that is better left to politically accountable agencies than the courts. *See id.* at 845; *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2372–74 (2001). Second, implementation of a regulatory scheme often requires expertise beyond "ordinary knowledge." *Chevron*, 467 U.S. at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)). Agencies, by definition, possess the insight and experience to resolve interpretive questions in "a detailed and reasoned fashion," while generalist courts are ill-equipped to administer "technical and complex" regulatory regimes. *Id.* at 865.[3]

Chevron's two practical justifications have no application to questions of regulatory jurisdiction. As *Mead* illustrates, courts discern an agency's jurisdiction based on legislative text and the traditional tools of statutory construction. 533 U.S. at 227–31. The need to mark the limits of congressional delegation trumps the need to reconcile policies or bring expertise to bear on technical,

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[3] The differences among the multitude of local planning and zoning laws argue forcefully that the FCC acted outside its area of expertise when defining the time frame for local decision-making. Variances, special exceptions, and conditional uses can varyingly be granted by zoning administrators, zoning boards, and local legislative bodies, sometimes seriatim. In addition, most jurisdictions require transparency through public notice and public hearing all subject to state-court review and differing requirements under state law and procedure. For these reasons, Congress removed from FCC jurisdiction the multitude of issues associated with a multitude of distinctly state and local planning and zoning laws.

substantive regulations. If the ideal reconciliation of competing policy considerations requires an agency to act *ultra vires*, the balance of competing policy goals is beside the point. The critical question of legislative authorization is one for the courts, both as a matter of constitutional competence and institutional capability. *See Chevron*, 467 U.S. at n.9 ("The judiciary is the final authority on issues of statutory construction...."). This is especially so when, as here, Congress' clear intent is to *limit* an agency's power (and preserve other regulators' authority), a purpose that conflicts with the agency's natural tendency toward expansion. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 388 (1988) (Brennan, J., dissenting). And even more especially so when the text, structure, and history of the Act make it clear that Congress struck a fine jurisdictional balance between various regulatory players. *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 18 (2001) ("[D]eparting from a precise statutory text may do no more than disturb a carefully wrought legislative compromise.").[4]

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[4] While the Fifth Circuit's deference rule finds no support in *Chevron*, a no-deference rule does find support in the Administrative Procedure Act (APA). The APA textually commits to the courts the power to resolve "all relevant questions of law." 5 U.S.C. § 706 (2006). Thus, beyond the guiding lights of the *Chevron* doctrine, there is hard statutory evidence that Congress affirmatively intended for courts to

B. Separation of Powers Principles Foreclose Judicial Deference to an Agency's Assertion of Jurisdiction.

None of the foregoing demonstrates that a judicial rule of deference to agencies in construing the bounds of their jurisdictional grants could not be justified. But it must be justified by reference to first principles, because *Chevron*—which derives a rule of deference from the assumption of congressional delegation of jurisdiction—simply cannot accomplish the task. And if the Court resorts to first principles, a rule of deference on ambiguous jurisdictional questions has almost nothing to recommend it. If the Court adopts a rule for construing the scope of congressional delegations of rulemaking jurisdiction, it has four basic options: it can adopt a rule disfavoring such delegations, a rule of strict neutrality, a rule favoring such delegations generally, or a rule favoring delegations when the agency affirmatively indicates an interest in exercising regulatory jurisdiction. The rule applied by the Fifth Circuit granting deference to an agency's view of its own jurisdiction is best understood as the fourth option. But in reality, there is little practical difference between the third and fourth options: human nature, political choice theory, and centuries-old figures of speech all suggest that few agencies will construe borderline cases as falling outside their

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decide legal, jurisdictional questions even while deferring to agencies' accommodation of competing and complex policy matters.

jurisdictions. *See* THE FEDERALIST NO. 51 (James Madison) (C. Rossiter ed. 1961); *but see Massachusetts v. EPA*, 549 U.S. 497 (2007).

There is no justification for adopting a rule that effectively allows agencies to broadly construe ambiguous statutes in favor of agency jurisdiction. As noted, *Chevron* does not support the result. Nor do first principles. If the Court is to adopt any presumption, it ought to be the opposite, liberty-preserving presumption that delegations from relatively accountable legislators to relatively unaccountable administrative agencies should be disfavored. *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 338 (2000). At a bare minimum, the Court should simply construe the jurisdictional grants as a matter of straight-up, presumption-free statutory construction. But under no circumstances should the Court adopt a rule favoring the broad construction of ambiguous delegations where agencies eagerly accept them. Such a theory certainly has nothing to recommend it as a matter of discerning likely congressional intent. *See* Merrill & Hickman, Chevron's *Domain*, 89 Geo. L.J. at 910 ("[I]t has never been maintained that Congress would want to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference.").

Further, separation of powers principles strongly counsel against broad constructions of regulatory jurisdiction. Administrative agencies possess no inherent powers; any authority they have is derived from statute. *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency

literally has no power to act ... unless and until Congress confers power upon it."); Sales & Adler, *The Rest is Silence*, 2009 U. Ill. L. Rev. at 1534 ("That is why they are called 'administrative agencies'—they are created to administer programs established by Congress, and in so doing they act as Congress's agents."). It is therefore "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "An agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

This is because Congress possesses all the legislative power granted by the Constitution. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). The executive branch's "take care" power is limited to implementing the laws enacted by the legislature. U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 3, cl. 5 ("[The President] shall take Care that the Laws be faithfully executed."). And the judiciary is tasked with conclusively interpreting and enforcing the limits of Congress' commands—including against the executive branch. U.S. Const. art III, § 1; *see, e.g.*, *New Process Steel LP v. NLRB*, 130 S. Ct. 2635 (2010).

Importantly, the Constitution's structural separation of powers does not consist of merely dividing power among the three branches. The genius of the Framers was not just a system of

separation of powers, but a system of checks and balances as well. As this Court has repeatedly remarked, the three branches are not "hermetically sealed" from one another, *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011), but one branch is often granted "partial agency" to check the self-aggrandizing instincts of the other branches, THE FEDERALIST NO. 47 (James Madison) (C. Rossiter ed. 1961). *See also Mistretta v. United States*, 488 U.S. 361, 380–82 (1989). Thus, while the veto is an executive power and not a legislative power—since all the legislative power resides in Article I—it nonetheless places a check on Congress' legislative authority. Impeachment is neither an executive nor judicial function, but it places a legislative check on both. And, most important here, judicial review provides the primary check on both legislative and executive authority. Generally speaking, the Constitution disfavors the exercise of completely unreviewed or unchecked authority by any branch, and the relatively few counterexamples are either inherently liberty-protecting (*e.g.*, the pardon power) or extremely unlikely to interfere directly with individual rights (*e.g.*, the legislative authority to promulgate internal rules).

All of this is elementary, and all of it strongly counsels against granting agencies deference in interpreting the metes and bounds of their own authority. Doing so would collapse the Constitution's separation of powers, and its checks and balances, by placing in the hands of one bureaucratic body the power to set, exercise, and enforce the limits of its own authority without significant review from another branch. *See Soc. Sec. Bd. v. Nierotko*, 327

U.S. 358, 369 (1946); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("[D]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). And it would do so in a context that very much threatens individual liberty because administrative agencies enjoy substantial discretion within the boundaries of their delegated authority. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001); *Mistretta*, 488 U.S. at 378–79; *id.* at 417 (Scalia, J., dissenting). This is a dynamic that courts generally seek to avoid, even when it is the judiciary that would exercise such concentrated power. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808–09 (1987); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring) ("That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers.").

This structural breakdown would, in turn, within the bounds of ambiguity, "encourage[] the agency to" adopt a broad view of its jurisdictional limits, "which [would] give it the power, in future [rulemaking and] adjudications, to do what it pleases." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."). Preventing this accumulation of administrative authority is no mere matter of

constitutional formalism. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring) (quoting Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949)).[5] Just as Congress cannot expand its enumerated powers under the Constitution, agencies cannot expand the regulatory jurisdiction granted in their organic statutes. And the courts have the final say in both instances. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In sum, the argument for granting agencies deference in interpreting the scope of their own authority cannot flow from *Chevron* because the *Chevron* Court derived its argument for deference from the undisputed assumption that the agency was exercising its delegated authority. The argument for deference must come instead from a consideration of first principles. And all of those first principles point away from making an agency the primary judge of its own jurisdiction.

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[5] At the same time, this rule also preserves the Constitution's due process protections by "ensur[ing] that power exercised by the executive is genuinely pursuant to law, meaning legislation properly enacted by Congress." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1787–88 (2012).

C. Courts Are Capable of Differentiating Between Assertions of Jurisdiction and Applications of Administrative Authority.

The theoretical case for granting agencies deference in construing their own authority is so weak, the only justification would be the practical difficulty of differentiating jurisdictional and non-jurisdictional questions. *See Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment). But the line between the two is neither illusory nor incapable of judicial administration. At the most basic level, agency jurisdiction is a question of *who*, *what*, *where*, or *when* an agency has authority to regulate. It is concerned with whether an agency has been delegated power over certain persons, activities, or subject matters—or in some cases whether the necessary conditions exist for an agency to exercise regulatory power. Application of administrative authority concerns *how* an agency exercises its authority over those subjects within its regulatory realm. Comparing this case to *Chevron* illuminates the distinction.

Quite obviously, *Chevron* posed a question about the *application* of regulatory power. No one questioned that the Environmental Protection Agency (EPA) had jurisdiction to issue regulations governing the permitting process for "stationary sources" of air pollution in States that had not met earlier air quality standards. Rather, the question confronting the Court was whether the EPA had adopted a definition of "stationary sources" that *substantively* fit with the Clean Air Act. The Court

had no problem drawing that line, and no one suggested that the question at hand was anything beyond the implementation of an ambiguous statutory term.

The crucial question here, though, is whether the FCC has regulatory power over local zoning decisions concerning wireless siting requests. The inquiry is not one of whether a rule comports with the meaning of a statutory term, or whether some factual scenario violates the terms of the Act. It is a more fundamental question of whether the agency can promulgate its rules at all, or apply the Act in the first instance—whether Congress has delegated authority for the FCC to act with the force of law on the matters addressed in section 332(c)(7).

Indeed, one need to look no further than the FCC's declaratory ruling to understand the distinction. Recognizing that it had to assure itself of the jurisdiction to regulate local zoning decisions before addressing the substance of any rule governing those transactions, the FCC devoted an entire section of its ruling to the jurisdictional question. *See* Pet.App.84a–92a ("Authority to Interpret Section 332(c)(7)"). There was no suggestion that the jurisdictional question collapsed into a policy question, or an assessment of substantive implementation. In fact, in a completely separate section of the ruling, after the agency decided it had authority to implement the Act, the FCC set forth its view of the optimal rules "on the merits." It mandated local zoning time limits, defined when a zoning decision "prohibits or has the effect of prohibiting the provision of personal wireless

service," and explained the statutory and evidentiary bases for those decisions. *See id.* at 92a–135a. Thus, the agency itself had no problem distinguishing between the question of *what* actions it can regulate and *how* it would regulate those actions.

The logic of *Chevron* dictates that courts defer to an agency's substantive interpretations of the statute it has jurisdiction to administer. But the courts must decide whether an agency has jurisdiction in the first place. That line can and should be drawn here.

II. *Chevron* Deference Is Especially Inappropriate When An Agency Asserts Jurisdiction Over Matters of Traditional State And Local Concern.

The horizontal separation of powers at the federal level is only one of the great structural protections in our Constitution. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. Respect for that dual sovereignty and the "integrity, dignity, and residual sovereignty of the States" takes many forms. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Chief among them are rules that demand a clear statement before a federal statute will be construed to interfere with traditional state functions, *see Gregory*, 501 U.S. at 460–61, or upset the balance between the national authority and state and local governments, *see Jones v. United States*, 529 U.S. 848, 858 (2000). Thus, wholly independent of the separation of powers concerns set forth above, the protections inherent in our Constitution's federalist structure foreclose *Chevron* deference in this case.

This Court has long required that Congress act with unmistakable clarity when affecting state and local power. *See Gregory*, 501 U.S. at 460–61. An administrative agency may therefore assert jurisdiction to regulate local decisionmaking only when Congress has clearly granted the agency jurisdiction to do so. In the face of ambiguity, which is a necessary precondition for *Chevron* deference, an agency simply lacks authority to expand its jurisdiction into traditional state and local terrain. There is thus no room for *Chevron* deference where, as here, an agency claims jurisdiction over local governmental procedures.

1. Just like the separation of powers, "[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory*, 501 U.S. at 458 (internal quotation marks omitted); *see also Bond*, 131 S. Ct. at 2364 ("Federalism secures the freedom of the individual."); *Printz v. United States*, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); THE FEDERALIST NO. 51 at 323 ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.").

Because the Supremacy Clause grants the federal government "a decided advantage" in the federal-state balance when Congress affirmatively

acts, *Gregory*, 501 U.S. at 460, courts will not lightly infer that Congress actually intends to displace state and local authority. Instead, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Jones*, 529 U.S. at 858 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); *see also, e.g.*, *Atascadero*, 473 U.S. at 242; *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543–44 (2002); *Gregory*, 501 U.S. at 460; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). By presuming that "Congress does not readily interfere" with state and local matters, this clear statement rule ensures that "the States retain substantial sovereign powers under our constitutional scheme." *Gregory*, 501 U.S. at 461. Thus, "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

Granting *Chevron* deference when an agency asserts jurisdiction over state or local affairs based on an ambiguous statute is simply incompatible with that clear statement rule. The first step of the *Chevron* framework, "always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Deference thus empowers the agency

only in cases of ambiguity. The clear statement rule, however, *requires* an "unambiguously expressed intent of Congress" before a statute may be interpreted to supplant state or local authority. Thus, *Chevron* deference is possible only when federal preemption of traditional state and local functions is not.

Simple doctrinal logic therefore dictates that an agency can *never* receive deference when construing its jurisdiction to displace or regulate state or local functions. A contrary rule would unnecessarily place *Chevron* and the clear statement rule on a collision course. If Congress has unmistakably granted an agency power to affect state or local actions, as required by the clear statement rule, then *Chevron* deference is unwarranted (and unnecessary). But if a statute is silent or ambiguous regarding an agency's authority to regulate state or local functions, as required for *Chevron* deference, then the requisite clear statement is missing.[6] The two bedrock doctrines thus foreclose any possibility that an agency's intrusion on local power, like the FCC's here, could be entitled to *Chevron* deference.[7]

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[6] In most cases, the clear statement rule will also prove inconsistent with *Chevron* step two. If an agency asserts jurisdiction over state or local matters, without unmistakable statutory authority for its preemptive actions, its interpretation is *per se* unreasonable. *See, e.g., American Bar Ass'n v. FTC*, 430 F.3d 457, 471–72 (D.C. Cir. 2005).

[7] This Court has adopted essentially the same view regarding legislative history and the clear statement rule: "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress'

This is for good reason. Any act of Congress that "significantly change[s] the federal-state balance," *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349), is itself quite a remarkable event—one that requires unambiguous action by both houses of the legislature and approval by the President. Indeed, the constitutionally prescribed legislative procedures themselves function as an important safeguard against such incursions on state sovereignty. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1339–42 (2001). Regulation by an administrative agency, by contrast, involves considerably fewer procedural hurdles: Notice and comment is hardly bicameralism and presentment. Thus, to demand unmistakable congressional intent when Congress acts alone, but permit the combination of an ambiguous statute and a self-aggrandizing agency acting clearly to displace state and local authority is fundamentally incompatible with the structure of our Constitution. It would allow unelected bureaucracies to achieve what Congress cannot—and to do so with the courts' cooperation, rather than oversight.

On this point, it is important to acknowledge that the clear statement rule conceptually ties the Constitution's twin structural protections together. *Congress* must clearly manifest its intent to displace

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intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). In *Dellmuth*, as here, the ultimate loadstar can only be *clear* statutory text. Legislative history and *Chevron* deference will not do when disrupting local power.

state or local power in a bill that complies with the various checks and balances on legislative authority. *See* U.S. Const. Art. I, § 7, cl. 2; *Chadha*, 462 U.S. at 945–46; *see also Wyeth v. Levine*, 555 U.S. 555, 585–86 (2009) (Thomas, J., concurring in the judgment) (identifying bicameralism-and-presentment as one of "two key structural limitations in the Constitution that ensure that the Federal Government does not amass too much power at the expense of the States"). Then, the *President* must approve Congress' clear statement by signing it into law. U.S. Const. art. I, § 7, cl. 2. And the federal *courts* will insist on a clear congressional command before presuming that Congress intended to encroach on local authority. The clear statement rule thus ensures that all three branches confirm a clear and politically accountable intent to displace state and local law. *Cf. FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1991) ("Federalism serves to assign political responsibility, not to obscure it."). An ambiguous statute fails to put the other branches, and the public, on notice of the potential threat to federalism. In other words, an ambiguous statute that is later interpreted by an agency to displace state and local authority evades a separation of powers check designed to preserve the federalist structure of our Constitution. Deferring to such an agency interpretation thus simultaneously undermines both strands of the Constitution's structural protections.

In keeping with the fundamental incompatibility between *Chevron* deference and the foregoing federalism principles, this Court has applied the clear statement rule to reject agency assertions of jurisdiction over borderline cases that involve

infringement on matters of traditional state and local concern. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, this Court refused to apply *Chevron* deference to the Army Corps of Engineers' interpretation of the Clean Water Act defining "navigable waters" to include intrastate waters that serve as habitats for migratory birds. 531 U.S. at 172. As the Court explained, constitutional avoidance concerns are "heightened where the administrative interpretation alters the federal state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173 (citing *Bass*, 404 U.S. at 349). Accordingly, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," the Court "expect[s] a clear indication that Congress intended that result." *Id.* (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *see also Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

2. The decision below ignores these constitutional concerns. The Fifth Circuit offered two primary justifications for deferring to the FCC's jurisdictional ruling: Congress did not clearly *deny* the FCC jurisdiction to regulate local zoning procedures and *other* sections of the Federal Communications Act grant the FCC general

authority to implement the Act. *See* Pet.App.39a–45a. But this gets things backwards. The clear statement rule requires affirmative statutory evidence that Congress unambiguously *granted* the FCC jurisdiction to regulate local zoning decisions. Neither statutory silence nor general jurisdiction is enough. *See Raygor*, 534 U.S. at 541 ("[W]e cannot read [the statute] to authorize district courts to exercise jurisdiction over claims against nonconsenting States, even though nothing in the statute expressly excludes such claims."); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991) (holding that the clear statement rule requires language more specific than a general grant of jurisdiction); *Atascadero*, 473 U.S. at 246 (same).

When the Fifth Circuit addressed the clear statement rule, it focused on the wrong question. In the court's view, the FCC's rules "only further refine[] the extent of the preemption that Congress has already explicitly provided." Pet.App.49a. To be sure, section 332(c)(7)(B)(ii) expresses clear congressional intent to ensure that state and local zoning authorities act on siting applications "within a reasonable period of time." But the critical question here is whether the statute clearly grants the FCC jurisdiction to do what it did—preempt local zoning procedures by setting specific time limits. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996) (explaining that courts must "identify the domain expressly pre-empted" by the statutory language (internal quotation marks omitted)); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis." (internal quotation marks

omitted)). If not, then *Chevron* deference is irrelevant. If so, then *Chevron* deference is unnecessary.

The decision below does not square with this Court's separation of powers or federalism jurisprudence, or the *Chevron* doctrine itself. It should be reversed.

* * *

None of this is to suggest that an agency's views are irrelevant or entitled to no weight in the judicial analysis. When *Chevron* deference does not apply, *Skidmore* deference does. *See Mead*, 533 U.S. at 234–35. Thus, when an agency determines the scope of its own jurisdiction, a reviewing court should afford that determination "a respect proportional to its 'power to persuade.'" *Id.* at 235 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). That is to say, the agency's "ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* But it may not *bind* the courts to accept any reasonable interpretation of the statutory text. This is as it should be. Both the separation of powers and federalism are too important for the courts to defer to an unpersuasive agency effort to expand its own jurisdiction. The proper separation of powers requires that Congress set an agency's jurisdictional limits and that the courts interpret and enforce those limits—especially when an agency seeks to preempt the sovereign powers of state and local governments.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INTERVENOR-RESPONDENT CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

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QUESTION PRESENTED

Whether a court should apply *Chevron* to review—and thus potentially defer to—an agency's determination of either the existence or scope of its own statutory authority, or instead decide such questions *de novo* as a matter of traditional statutory construction.

CORPORATE DISCLOSURE STATEMENT

Cellco Partnership d/b/a Verizon Wireless ("Cellco") has four partners. Two of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Mobile Systems, Inc. and GTE Wireless Incorporated (collectively, the "Verizon Partners"). Neither of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). Neither of the Vodafone Partners is publicly held. Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

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BRIEF FOR INTERVENOR-RESPONDENT CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

INTRODUCTION

This case presents a particularly important question of administrative law—whether a court should apply the familiar two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when reviewing an agency's interpretation of its own jurisdiction, *i.e.*, its substantive authority to regulate in a particular area or with respect to certain entities. The answer to that question is "no."

This answer logically flows from *Chevron* and its progeny, as well as from the important constitutional principles upon which that precedent is based. As all of those sources of law make clear, agencies have no authority save that affirmatively delegated to them by Congress. Thus, although agencies enjoy some judicial deference when they fill in the details of a statutory scheme that Congress has charged them with administering, a "precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). Accordingly, an agency's claim to deference for a given decision requires a threshold determination whether Congress delegated authority over that decision to the agency. That threshold determination, in turn, is one that a reviewing *court* must make *de novo*, using traditional tools of statutory construction: because delegation is a *precondition* to deference, there can be no deference in deciding whether that precondition has been satisfied.

In addition, resolving questions concerning the existence or scope of agency authority do not involve the interstitial policymaking or specialized technical expertise that underlie the deference accorded under *Chevron*. They are instead quintessentially legal matters that courts routinely resolve. Nor do principles of political accountability counsel in favor of deference to an agency's determination of its own power. Just the opposite: to hold *Congress* accountable for its judgments about whether and how much authority to delegate to agencies, it is critical that Congress make that judgment in the first instance rather than leave it to agency officials to define their own domain. This is all the more true in the case of "independent" agencies, such as the Federal Communications Commission ("FCC"), that do not answer to the President and are further insulated from the electorate than Executive Branch agencies.

To apply the *Chevron* framework to agency determinations of statutory authority would effectively empower agencies—rather than Congress—to establish the scope of their own regulatory powers, subject only to a lenient "reasonableness" check by the Judiciary. Given the natural tendency of agencies to seek continually to expand their authority, allowing them broad compass in this area would put the fox in charge of the regulatory henhouse.

Petitioners are wrong, however, to the extent they argue that resolution of the *Chevron* question requires reversal of the judgment below. The specific agency action at issue here is well within the FCC's authority to interpret the substantive provisions of the Communications Act, as established by this Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Accordingly, regardless of how

the deference issue is resolved, the judgment of the court of appeals should be affirmed.

STATEMENT OF THE CASE

1. Americans' use of wireless communications services has grown enormously over the past two decades, and it continues to grow at a rapid pace. Wireless carriers' ability to deliver the benefits of seamless nationwide coverage, however, depends on their ability to build wireless facilities. Though wireless service is widely acknowledged to be popular and beneficial, the facilities on which it depends can sometimes be unpopular with nearby property owners. Wireless tower siting requests thus can generate "pressure" on local governments "to tighten and strictly enforce zoning restrictions on wireless facilities, creating numerous pockets of resistance for wireless carriers." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 52 n.9 (1st Cir. 2009).

2. Recognizing this "'not in my backyard' ... problem," *id.*, and the threat it poses to a truly national wireless network, Congress acted in 1996 "to encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] ... the impediments imposed by local governments upon the installation of [wireless] facilities," *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (internal quotation marks omitted). Congress's chosen means for doing so was to expressly—and in no uncertain terms—preempt state and local authority in certain respects by "impos[ing] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* Those limitations are embodied in 47 U.S.C. § 332(c)(7).

Section 332(c)(7)(B) sets forth several "[l]imitations" on state and local government authority over the "regulation of the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(B)(i). In particular, the statute provides that state and local governments "shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii) (emphasis added). Congress further provided that, "[e]xcept as provided in this paragraph" including the limitations set forth in Section 332(c)(7)(B), "nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(A). Congress created a judicial cause of action for "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with [Section 332(c)(7)]." *Id.* § 332(c)(7)(B)(v).

3. In 2008, CTIA—The Wireless Association® ("CTIA"), of which Verizon Wireless is a member, petitioned the FCC to address the substantial delays that wireless carriers encountered when seeking approval to build wireless facilities from state and local governments. CTIA explained that a significant and unacceptable number of wireless tower siting requests were being delayed past any reasonable period of time, contrary to the mandate of Section 332(c)(7)(B)(ii). CTIA presented evidence that of the 3,300 wireless siting applications

pending before local jurisdictions, approximately 760 had been pending for more than one year, and more than 180 applications had been pending for more than three years. CTIA also submitted examples of situations in which particular localities had delayed proceedings for multiple years, held dozens of hearings, and ultimately forced a wireless carrier to go to court before construction could begin. CTIA asked the FCC to declare specific periods beyond which any delay would be a failure to act within "a reasonable period of time," and therefore would violate Section 332(c)(7)(B)(ii).

Verizon Wireless, which has been directly involved in drawn-out controversies over tower siting, submitted substantial evidence supporting the need for action to address the delay of tower siting approvals. At the time, Verizon Wireless had more than 350 new site applications pending, of which more than half had been pending for more than six months and nearly 100 for more than a year.

On November 18, 2009, the FCC issued the *Ruling*, granting some of the relief requested in CTIA's petition. *See Petition For Declaratory Ruling To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C.R. 13994 (2009) ("*Ruling*"). As a threshold matter, the agency concluded that it had authority to interpret substantive provisions of the Act, such as Section 332(c)(7)(B), relying on this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the Sixth Circuit's decision in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). It also concluded that its rulings were

consistent with Section 332(c)(7)(A) because it was not "imposing new limitations on State and local governments" but "merely interpret[ing] the limits Congress already imposed on State and local governments" through the express preemption provisions of Section 332(c)(7). *Ruling*, 24 F.C.C.R. at 14002 (¶ 25).

On the merits, the Commission determined that the record included "extensive statistical evidence" to support a finding of "unreasonable delays" and "obstruct[ion]." *Id.* at 14006 (¶ 34). It further found that local governments should generally be reasonably able to review applications for collocations (*i.e.*, the placement of additional radio antennas on existing structures) within 90 days and for new wireless facilities within 150 days. *Id.* at 14012 (¶ 45). Although CTIA, Verizon Wireless, and other industry participants presented evidence suggesting that it would be reasonable to process applications in half that time, the Commission decided that it should allow more time for "explor[ing] collaborative solutions," for localities "to prepare a written explanation of their decisions," and for "reasonable, generally applicable procedural requirements in some communities." *Id.* at 14011 (¶ 44).

Based on its findings, the Commission declared that a local government presumptively fails to act on a collocation application within a reasonable period of time if it does not act within 90 days for a collocation or 150 days for a new facility. *Id.* at 14012 (¶ 45). At that time, a "failure to act" has occurred within the meaning of Section 332(c)(7)(B)(v), and the provider may seek judicial review—though the local government remains free to show in court that, under the circumstances of a particular application, the time it took was reasonable. *Id.* at 14004-05 (¶ 32). The

Commission declined to adopt any presumption about the remedy for unreasonable delay, finding it more consistent with congressional intent for the courts to determine such questions on a case-by-case basis. *Id.* at 14009 (¶ 39).

4. The U.S. Court of Appeals for the Fifth Circuit upheld the *Ruling* on January 23, 2012. *See City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012). The court of appeals held that the Commission had statutory authority to issue the *Ruling*. *See id.* at 247-54. It began by considering whether the *Chevron* framework applied. It acknowledged that the circuits disagree over whether to "apply *Chevron* deference to disputes over the scope of an agency's jurisdiction," but concluded that Fifth Circuit precedent required it to apply *Chevron* to such disputes. *Id.* at 248.

Applying *Chevron*, the Fifth Circuit concluded that the statute did not "unambiguously indicate Congress's intent to preclude the FCC from implementing Section 332(c)(7)(B)(ii) and (v)." *Id.* at 250. As to Section 332(c)(7)(A), the court of appeals found that the provision "certainly prohibits the FCC from imposing restrictions or limitations [on state or local zoning authority] that cannot be tied to the language of § 332(c)(7)(B)," but does not itself speak to the question "[w]hether the FCC retains the power of implementing those limitations," *id.* It further held that Section 332(c)(7)(B)(v), although establishing judicial jurisdiction over "specific dispute[s] between a state or local government and persons affected by the government's failure to act," does "not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those" specific disputes. *Id.* at 251.

The Fifth Circuit then found the FCC's substantive interpretation of Section 332(c)(7)(B) to be reasonable. *See id.* at 252-54. Because the statutory terms "a reasonable period of time" and "failure to act" are ambiguous, the court held that it owed "substantial deference to the FCC's interpretation of those terms." *Id.* at 255. The court thus upheld the regulation as a permissible construction of the statute.

5. On October 5, 2012, the Court granted the petitions for certiorari limited to the question whether reviewing courts should apply *Chevron* to review an agency's determination of its own jurisdiction.

SUMMARY OF ARGUMENT

I. Under this Court's precedent, and consistent with bedrock principles of separation of powers and political accountability, Congress must always make the initial decision that certain activity in our national economy should be subject to federal regulation and then resolve the fundamental policy choices about how and by whom the activity should be regulated. *See, e.g., J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928). When Congress has made those basic policy judgments and delegated authority to an administrative agency to implement the statutory scheme, the agency receives, under *Chevron*, a measure of judicial deference when it fills in statutory gaps in determining how best to accomplish its congressionally-assigned task. The core rationale for this rule is that it fulfills congressional intent by allowing the agency to address interstitial issues with its relatively greater technical expertise, while preserving political accountability for fundamental policy choices in the elected branches of the government.

The rule of *Chevron* also rests upon a crucial premise—namely, that Congress has, in fact, delegated authority over the matter in issue to the agency. If not, there is no basis for deference, because an agency can only act within the sphere of power delegated by Congress. Accordingly, an agency could only be eligible for judicial deference when acting within the scope of authority that Congress has actually delegated to it. A reviewing court must make the determination whether an agency is acting pursuant to congressionally-delegated authority *de novo* because such authority is a "precondition to deference under *Chevron*." *Adams Fruit*, 494 U.S. at 650. When the court determines that the agency's action is based on such authority, it may proceed to the familiar two-step inquiry under *Chevron*.

Moreover, deferring to an agency's judgment about the existence or scope of its own authority would contravene fundamental separation-of-powers principles underlying the *Chevron* framework. Courts defer to an agency's exercise of policymaking authority, but only *if* that authority has been properly delegated. Allowing agencies to decide in the first instance the limits of their policymaking power would improperly transfer legislative authority from Congress to the Executive, and override the Judiciary's exclusive authority to construe legislative delegations, as well as its duty to police the constitutional boundaries between the branches.

The pragmatic considerations that undergird *Chevron* also counsel strongly against deference to an agency's determination of its own statutory authority. First, although agencies may be experts on technical issues within their delegated domain, they "can claim no special expertise in interpreting a statute confining

its jurisdiction." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting). Second, deferring to an agency's determination of its own regulatory bounds would allow Congress to avoid political accountability for making the hard choices as to whether, how, and by whom particular sectors of our national economy should be regulated. While this is true with respect to all federal agencies, it is all the more important in the case of "independent" ones such as the FCC, which are outside the direct control of the President and further removed from political accountability than Executive Branch agencies. Third, agencies have strong institutional incentives to continually expand their powers, and deferring to agency determinations regarding the existence and scope of their own authority would allow them to expand their regulatory domain without any clear indication that Congress ever intended such a result. It is ultimately the Judiciary that much check such self-aggrandizement, for "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

II. To the extent Petitioners argue that resolution of the *Chevron* question requires reversal of the judgment in this case, they are wrong. The agency order at issue here merely interpreted, in a reasonable and well-supported manner, a specific, substantive provision of the Communications Act. In particular, the FCC determined what constitutes a "reasonable period of time" and a "failure to act" under Section 332(c)(7)(B), which speaks directly to the timing of state and local action on wireless tower siting requests. Congress plainly exercised its legislative authority in this area, and this Court has determined that the FCC possesses delegated

authority to interpret the substantive provisions of the Communications Act such as Section 332(c)(7)(B). *Iowa Utils. Bd.*, 525 U.S. at 378, 380. Accordingly, the judgment can and should be affirmed, even without deference to the FCC's judgment regarding its own authority to issue the *Ruling*.

ARGUMENT

I. COURTS SHOULD NOT DEFER TO AN AGENCY'S DETERMINATION AS TO THE EXISTENCE OR SCOPE OF ITS OWN AUTHORITY.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *see also Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("Determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). That longstanding rule applies fully when the controlling statute is ambiguous as to the existence or scope of the agency's power—courts cannot defer to the agency's resolution of that ambiguity, because determining the limits of an agency's statutory power must be a purely judicial function.

As a general matter, when Congress has delegated to the agency the authority to perform a given task, but the statute is ambiguous or contains gaps in terms of the details as to how the agency is to accomplish that task, the *Chevron* doctrine requires courts to presume that Congress implicitly delegated to the agency the authority to resolve the ambiguity and address those interstitial details. An essential prerequisite for deference under *Chevron*, however, is a congressional delegation

of authority. An agency can only exercise authority that Congress has given it, and so a court can defer only to decisions made within the scope of that authority. Because deference itself requires a delegation of authority, deference cannot be applied to an agency decision about whether there has been a delegation of authority in the first place.

Such decisions are not subject to deference for additional reasons embedded within *Chevron* itself—including fundamental distinctions between the constitutional roles of the Legislative, Executive, and Judicial Branches, as well as pragmatic considerations such as relative institutional expertise and control over agency self-aggrandizement. As explained below, these principles all point to the same conclusion: no deference.

A. Because The *Chevron* Framework Assumes A Valid Delegation Of Authority, It Cannot Logically Be Applied To An Agency's Determination That It Possesses Delegated Authority In The Area At Issue.

1. a. The *Chevron* doctrine rests on the fundamental assumption that Congress has delegated to the agency policymaking authority over the particular matter at issue. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 158-60 (2000). Sometimes that delegation is explicit—Congress may leave a "gap" in the statute and instruct the agency to promulgate rules to fill that gap. *Chevron*, 467 U.S. at 843-44. The delegation may also be "implicit[]," in that Congress has left the statute "silent or ambiguous" with respect to a particular aspect of the job that it has assigned to the agency, *id.* at 843, while delegating to the agency the authority to administer

the statute through interstitial rulemaking or other administrative action, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). When Congress has delegated authority to an agency to perform a particular task, courts presume "that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 123; *see also Mead*, 533 U.S. at 229. This so because Congress is likely to "focus[] upon, and answer[]" the "major questions" raised in a statute, leaving "interstitial matters" to agency resolution. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); *see also Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Chevron thus rests on a fundamental premise antecedent to its more familiar two-step inquiry. Before even engaging in that inquiry, the threshold question—which has been described as "*Chevron* Step Zero," Merrill & Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 910 (2001)—is whether Congress has delegated to the agency authority over the matter at issue. As this Court has explained, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit*, 494 U.S. at 650; *see also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (explaining that *Chevron* deference is only appropriate when a rule is "promulgated pursuant to authority Congress has delegated to the official"). Indeed such delegation is a necessary prerequisite to the exercise of *any* power by the agency: for an agency "literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's

power to promulgate legislative regulations is limited to the authority delegated by Congress."); *Regents of Univ. Sys. v. Carroll*, 338 U.S. 586, 597-98 (1950) ("As an administrative body, the [FCC] must find its powers within the compass of the authority given it by Congress"). Thus, absent a proper delegation, an agency's decision is *ultra vires* and entirely invalid, not one that can or should be deferred to.

In short, the *Chevron* framework can logically apply to an agency's decision only to the extent that decision is actually within the power delegated to the agency by Congress. It follows that the *Chevron* framework does *not* apply where Congress did not delegate authority over the matter. *See Mead*, 533 U.S. at 231 n.11 ("If *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply." (quoting Merrill & Hickman, *Chevron's Domain*, at 872)). Thus, as the Court put it in *Mead*, "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency," the *Chevron* framework is wholly "'inapplicable.'" 533 U.S. at 230 (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting)); *see also* Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 813 (2002); Sales & Adler, *The Rest is Silence: Chevron Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1533-34 (2009).[1]

1. Indeed, the Court has never "read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent.'" Breyer, *Judicial Review of Questions of Law and Policy*, at 373; *see generally Barnhart*, 535 U.S. at 222 (explaining "that whether a court should give [*Chevron*] deference depends in significant part upon ... the nature of the question at issue").

b. This Court has repeatedly resolved this "Step Zero" question *before* applying *Chevron*'s two-step inquiry. *Mead* made the point most directly, holding that *Chevron* does not govern all agency interpretations of ambiguous statutory provisions, but only those statutory ambiguities as to which Congress vested the agency with primary interpretive authority, *i.e.*, only where there is a "Step Zero" delegation. *Chevron* applies, the Court explained, only where it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229. Then, and only then, is a reviewing court "obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.*

The Court followed the same "Step Zero" approach in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), and *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), applying the *Chevron* framework only after assuring itself that Congress clearly conferred authority upon the agency to speak with the force of law regarding the statutory ambiguity at issue. In *Pfennig*, the Court began its analysis by stating that "Respondent does not challenge the Board's authority to issue binding regulations," and only then moved on to applying *Chevron*'s familiar two-step test. 541 U.S. at 238-39. And in *Brand X*, the Court cited *Mead* in explaining that the *Chevron* framework applied precisely because the scope of the Commission's jurisdiction was *not* at issue. *See Brand X*, 545 U.S. at 981 ("[N]o one questions that the order is within the Commission's jurisdiction. Hence ...

we apply the *Chevron* framework to the Commission's interpretation of the Communications Act.") (internal citations omitted).

The Court's decision in *Gonzales* adhered to that same approach, but ultimately held that the Attorney General lacked statutory authority to regulate physician-assisted suicide. At issue in that case was the Attorney General's construction of a phrase in the Controlled Substance Act ("CSA"). Although the phrase was concededly ambiguous, and the CSA vested the Attorney General with general "rulemaking power to fulfill his duties under the CSA," the Court concluded on *de novo* review that the Attorney General was "not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." *Gonzales*, 546 U.S. at 258. The inquiry, in other words, ended at "Step Zero": Congress did not delegate to the Attorney General the authority to adopt the rule at issue and thus, even though the statute was ambiguous, deference was inapplicable.

2. The foregoing discussion should suffice to establish that the *Chevron* framework cannot be applied in answering the threshold question whether the agency has authority over a given issue. As explained, the framework applies only when it is first established—at "Step Zero"—that Congress delegated authority over the question to the agency. As a matter of logic, a court cannot defer to the agency in answering that question: deference applies only *if* the agency has authority over the issue, so deference cannot be applied in deciding *whether* the agency has authority over the issue. To hold otherwise would be to say that *Chevron* deference applies to the question whether *Chevron* deference applies, which is nonsensical.

For this reason, the "Step Zero" question of agency authority over the issue is one that logically must be answered by a reviewing court in the first instance. Once the court determines, through the normal judicial tools of statutory construction, that Congress has delegated to the agency the power to act in the area at issue, the *Chevron* framework applies, and the court must defer to the agency's reasonable resolution of statutory ambiguities pursuant to that delegation of authority.

B. Constitutional Separation-Of-Powers Principles Also Preclude Deference To An Agency's Determination Of Its Own Statutory Authority.

Chevron's threshold requirement of a delegation of authority to the agency arises from fundamental separation-of-powers principles. When those principles are applied to the instant context, they preclude courts from deferring to an agency's determination of its own statutory authority.

As explained above, an agency can only act pursuant to congressionally-delegated authority, and thus *Chevron* deference necessarily can apply only to decisions made *within* that authority—not to decisions *about* that authority. Presuming from statutory silence or ambiguity that Congress delegated to an agency the authority to determine the breadth of its own power would be inconsistent with the Constitution's division of responsibilities among the branches. Only Congress can exercise legislative power, *see* U.S. Const. art. I, § 1, and an agency possesses only the power that Congress gives it, *see supra* pp. 12-13. The Executive Branch must "take Care that the Laws" enacted by Congress "be faithfully executed." U.S. Const. art. II, § 3. And the Judiciary has

the exclusive duty to say what the law is. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The traditional *Chevron* framework is consistent with those tenets, because it assumes that an agency, in resolving a statutory ambiguity concerning the execution of a task that Congress has assigned it, is merely implementing legislative policy that Congress established. By contrast, the same tenets should preclude an agency from resolving an ambiguity as to its own jurisdiction—subject only to lenient "reasonableness" review—because the agency then would be deciding for itself whether and to what extent legislative power should be delegated and how it should be exercised, thus shifting basic lawmaking power to the agency. That approach would violate both Congress's exclusive authority to exercise legislative power, including by delegation, as well as the Judiciary's exclusive authority to decide whether a statute effectuates such a delegation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("Whether [a] statute delegates legislative power is a question for the courts[.]").[2]

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2. Respecting and enforcing the distinct constitutional functions of the different branches is not merely a formalistic or theoretical imperative. Rather, "[i]t is a familiar notion that the separation of powers doctrine generally serves to protect liberty ... by dispersing governmental power." Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 645 (1996); *see, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 450, 452 (1998) (Kennedy, J., concurring) ("Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority" because "concentration of power in the hands of a single branch is a threat to liberty.").

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." *Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (quoting Montesquieu, Spirit of the Laws bk. XI, ch. 6, p. 173 (O. Priest ed., T. Nugent transl. 1949)). Yet that is precisely what deference to an agency's determination of its own authority would allow—agencies would answer for themselves the statutorily unanswered question about the existence or extent of their own power, and they would then exercise that self-endowed authority.

It is especially unwarranted to defer to an agency's determination of its authority because the foregoing principles suggest that Congress could not constitutionally delegate such decisions to an agency, even if it tried to do so expressly. This Court has long held that "'Congress may not delegate its purely legislative power.'" *J.W. Hampton*, 276 U.S. at 408 (quoting *Interstate Commerce Comm'n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912)); *see also Whitman*, 531 U.S. at 472 ("Article I, § 1 ... vests 'all legislative Powers herein granted ... in a Congress of the United States.' This text permits no delegation of those powers."). Congress can only delegate to an agency the power to execute the fundamental choices that Congress has itself made, and thus must set forth an "intelligible principle" to channel the agency's discretion for the delegation to be permissible. *Id.* Congress must not only make the basic policy calls at issue in delegating its authority to an agency, but Congress must be the one to decide whether to make such a delegation at all, *i.e.*, whether to grant an agency the substantive regulatory power to act in a particular area or with respect to particular entities. "It is the hard choices, and not the

filling in of the blanks, which must be made by the elected representatives of the people." *Indust. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). Regardless, it would be especially problematic to conclude that Congress had delegated such critical decisions *implicitly* through statutory silence or ambiguity. At the very least, rejecting the view that such silence or ambiguity can be read as an implicit delegation to an agency of the power to determine its own regulatory domain would avoid a serious constitutional question.

C. Pragmatic Considerations Of Institutional Expertise, Political Accountability, And Control Over Agency Self-Aggrandizement Also Preclude Deference To An Agency's Determination Of Its Own Authority.

The pragmatic considerations underlying *Chevron*—including institutional expertise, political accountability, and the administrative state's institutional tendency toward self-aggrandizement—also counsel strongly against deference to agency determinations of their own authority. This is so for the reasons explained below.

This Court's *Chevron* cases have emphasized that courts should defer to agencies' statutory gap-filling decisions (pursuant to delegated authority) because such decisions "involve[] difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 865-66). As *Chevron* itself observes, the "responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest

are not judicial ones," but instead are "vest[ed] ... in the political branches." 467 U.S. at 866 (citation omitted). *Chevron* thus reasoned that when an agency acts in a gap-filling capacity, its relatively greater expertise and political accountability leave it in a better position than courts to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66.

That principle obtains, however, only to the extent that Congress has, in fact, delegated policymaking responsibilities to the agency. While agencies may be expert in implementing the policymaking power Congress grants them, "agencies can claim no special expertise in interpreting a statute confining its jurisdiction." *Miss. Power & Light Co.*, 487 U.S. at 387 (Brennan, J., dissenting); *see also* Sales & Adler, *The Rest is Silence*, at 1535; Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1013-14 (1999). Construing a statute to identify the limits of agency authority requires no scientific or technical ability; rather, it requires facility with the familiar *judicial* tools of statutory construction.

Nor does the fact that agencies are thought to be more politically accountable than courts warrant judicial deference to an agency's determination of its own authority. *Chevron* reasoned that, when an agency has been granted authority to regulate, its relative political accountability provides a basis for deference in the case of statutory ambiguity because the interpretive question requires "a reasonable accommodation of conflicting

policies that were committed to the agency's care by the statute." 467 U.S. at 845 (citation omitted). When Congress has entrusted the agency with reconciling such conflicting policy choices, the agency (at least in the case of Executive Branch agencies) can theoretically be held accountable for the manner in which it does so. But it is Congress, not the Executive, that must be responsible for making the decision to delegate legislative power and delineating the scope of that delegation in the first place—as explained, "an agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Allowing administrative agencies to resolve statutory ambiguities concerning their own power would allow the responsible body—Congress—to *avoid* political accountability for its decisions about who should make difficult policymaking judgments. And it is far from clear that agencies themselves could be held politically accountable, in any realistic way, for decisions concerning their statutory power.

Another grave practical problem in this context is that agencies have a vested interest in expanding their regulatory reach beyond the domain delegated by Congress. Agencies, like other bureaucratic bodies, have systematic, "institutional interests in expanding [their] own power." *Miss. Power & Light*, 487 U.S. at 387 (Brennan, J., dissenting); *see also* Breyer, *Judicial Review of Questions of Law and Policy*, at 371 ("Courts sometimes fear that certain agencies suffer from 'tunnel vision' and as a result might seek to expand their power beyond the authority that Congress gave them."); Sales & Adler, *The Rest is Silence*, at 1551-54; Merrill & Hickman, *Chevron's Domain*, at 867. Allowing an agency to define its own authority would inevitably lead to the expansion of that authority—"which [would] give [the agency] the

power, in future [proceedings], to do what it pleases." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

Independent agencies—such as the FCC—present especially serious problems when it comes to the possibility of deference on questions of statutory authority. By design, such agencies are even less politically accountable than Executive Branch agencies. In addition to the fact that Congress must remain accountable for the fundamental policy choices about federal regulation, discussed above, another traditional rationale for deference to agency decisions made pursuant to delegated authority is that Executive Branch agencies are politically accountable to the President who, in turn, is ultimately accountable to the people for the actions taken by those in his administration. *See Chevron*, 467 U.S. at 866 ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."); *see also id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."). That justification for *Chevron* deference has no force with respect to independent agencies because they are not directly within the President's control. *See* Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376-77 (2001) (arguing that *Chevron's* rationale suggests that courts should apply a less deferential standard to independent agencies). In the case of independent agencies, therefore, concerns about the lack of political accountability are at their zenith. This concern, combined with the general institutional interest of agencies to continually expand their authority, means that it is especially important that courts exercise their own judgment in policing the statutory boundaries of independent agencies. For any federal agency, but

particularly with respect to independent agencies, it is ultimately the Judiciary's responsibility to ensure political accountability and check self-aggrandizement: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951.

Indeed, a rule of deference to agency decisions regarding their own statutory authority inevitably would result in a major expansion of the powers of the administrative state. As a practical matter, such a rule would establish a buffer zone of "reasonableness" around existing agency authority, thereby automatically enlarging the sphere within which agencies could operate. *See* Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, at 1011-12. The boundaries of the administrative state would thus push outward from the domain delegated by Congress as independently construed by courts, to a larger, "jurisdiction plus" basis primarily defined by agencies. To prevent the very aggregation of power that the Framers predicted, and designed the Constitution's structural protections to avoid, this Court should hold that agencies cannot effectively determine their own authority.

D. Courts Can Identify Questions About The Existence Or Scope Of Delegated Authority, And To The Extent It Is Difficult To Do So In A Given Case They Should Err On The Side Of *De Novo* Review.

One concern that has been expressed about the applicability of the *Chevron* framework to questions of agency authority is that it is difficult to distinguish

between cases concerning the existence or scope of an agency's statutory authority, on the one hand, and those concerning the manner in which the agency exercises that authority, on the other. *See Miss. Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment). But courts routinely distinguish between grants of, or limitations on, statutory authority and unreasonable exercises of authority already conferred. *See* Br. for Respondents International Municipal Lawyers Association ("IMLA") *et al.* 33-35; Br. for *Amici Curiae* National Governors Association *et al.* 21-31; Br. for *Amici Curiae* America Farm Bureau Federation *et al.* 26-37.

Certain kinds of questions obviously go directly to an agency's authority to act. For example, provisions that expressly limit an agency's authority, *see, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (involving express statutory limitation on FCC authority to regulate broadcasters as common carriers); 47 U.S.C. §§ 153(51), 332(c)(2) (express limitations on FCC authority to regulate certain entities as common carriers), indisputably seek to define the agency's authority, *see Miss. Power & Light*, 487 U.S. at 387 (Brennan, J., dissenting) ("[A] statute confining the agency's jurisdiction ... by its nature ... manifests an unwillingness to give the agency the freedom to define the scope of its own power."). The same is true with respect to statutes of limitations on governmental action, which "uniquely limit[] when an agency may act—*even within* otherwise lawful bounds." *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 767-68 (D.C. Cir. 2012) (Brown, J., concurring). Likewise, when agencies seek to expand their regulatory reach into entirely new areas involving "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, without any clear congressional mandate to do so, such action inherently presents questions

regarding their statutory authority over those areas, *see* Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, at 1011-12. In this case, the FCC recognized that it was obliged to establish its "authority" to interpret the relevant provisions of Section 332(c)(7), *see Ruling*, 24 F.C.C.R. at 14000-03 (¶¶ 20-26), and the court of appeals had no difficulty recognizing this as a question that went to the agency's delegated authority to do so, *see City of Arlington*, 668 F.3d at 247-54.

In fact, Congress itself has recognized the distinction between questions concerning the existence or scope of agency authority and questions concerning the reasonable exercise of delegated authority. The Administrative Procedure Act ("APA") requires courts to "set aside agency action ... *in excess of* statutory jurisdiction." 5 U.S.C. § 706(2)(C) (emphasis added). The APA separately requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). The former provision is about agency action that is *ultra vires*, *i.e.*, undertaken without statutory authority to do so, whereas the latter provision concerns agency action that is based on a grant of delegated authority but implements that authority unreasonably or otherwise improperly. That the APA itself recognizes this distinction should eliminate any concern that the distinction does not exist, or that courts are not able to determine it on a case-by-case basis.

That is not to say that hard cases will not arise. But hard cases arise under any rule, and in these cases, as in others, courts "will make reasoned choices between the two examples, the way courts have always done." *Mead*, 533 U.S. at 237 n.18. The existence of close cases should

not lead judges to simply apply the *Chevron* framework across the board. If anything, the principles described above should resolve any significant doubt in a particular case in favor of concluding that a provision is subject to *de novo* review, so as to assure that agencies are not empowered to define the authority that they exercise. This approach would also encourage Congress to speak clearly in assigning authority to an administrative agency, further reinforcing important constitutional and administrative law principles. And Congress could always clarify an agency's jurisdiction in the event that it does want the agency to exercise authority in a particular area or over particular entities. *See, e.g.*, 21 U.S.C. § 387a (granting FDA authority over tobacco products after *Brown & Williamson*).

E. There Is No Issue In This Case That Warrants A Special Rule For Statutes Purportedly Implicating Matters Of Traditional State And Local Concern.

Contrary to the argument advanced by a group of intervenor-respondents led by the International Municipal Lawyers Association (the "IMLA Respondents"), *see* Br. for IMLA Respondents *et al.* 21-35, this case does not present any serious issue of state and local concern and, in any event, there is no reason to adopt a special rule regarding the applicability of *Chevron* for statutes that arguably implicate such concerns.

First, this is not a case about federalism. It is about the meaning of the statutory terms "reasonable period of time" and "failure to act," both of which reside in the express preemption provisions of 47 U.S.C. § 332(c)(7)(B).

Here, Congress expressly and deliberately "limit[ed]," *id.*, state and local governmental power with respect to the processing of requests for wireless tower siting. The only question here is whether the Commission or the Judiciary is responsible for interpreting those terms in the first instance. This question "is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Because Congress has "unquestionably" manifested its intent to take these issues "away from the States," *id.*, this debate does not implicate any significant federalism concern.

Second, the IMLA Respondents are incorrect. Whether or not to defer to an agency's determination as to its own authority should not turn upon the particular type of statute at issue in a particular case. Rather, it depends upon—and can be fully resolved by—the general principles of congressional intent and *horizontal* separation of powers concepts discussed above. *Chevron*, as explained above, is premised on the proposition that agencies, in determining how to perform particular tasks assigned to them by Congress, are better suited than courts to find a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." 467 U.S. at 845 (quotation omitted). Questions that implicate federal-state relations are not excluded from that rationale.

To the contrary, one of the cases upon which *Chevron* relied was *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), which involved the question whether an FCC regulatory scheme was "intended to preempt any

state regulation of the signals carried by cable system operators," *id.* at 698. Yet in *Capital Cities*, this Court appropriately deferred to the FCC's determination to preempt the state scheme because it "'represent[ed] a reasonable accommodation of conflicting policies' that are within the agency's domain." *Id.* at 700 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). In addition, the Court has applied the *Chevron* framework in reviewing agency interpretations of federal statutes preempting state law. *See, e.g., Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (applying *Chevron* to an interpretation by the Office of the Comptroller of the Currency to a provision of the National Bank Act preempting certain state substantive laws affecting banks). The same approach is appropriate here.

Third, this argument does not appear to have been pressed below, and certainly was not passed upon by the Fifth Circuit. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court ... is one of final review, not of first view.") (internal quotation marks omitted). Indeed, any decision limited to this ground would prevent the Court from answering the question on which it granted review—whether *Chevron* applies in cases involving agency determinations of their own jurisdiction, not just that subset of cases involving preemption provisions. The Court should provide guidance to the lower courts in the many cases that do not involve fairly unusual provisions such as Section 332(c)(7)(A)—including, most notably, those that comprise the circuit split here. *See, e.g., N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002).

II. THE FCC'S AUTHORITY TO INTERPRET SUBSTANTIVE PROVISIONS OF THE COMMUNICATIONS ACT SUCH AS SECTION 332(c)(7)(B) IS WELL ESTABLISHED.

To the extent that Petitioners argue that resolution of the *Chevron* question in their favor requires reversal of the judgment below, they are wrong.[3] This Court previously decided, in a case paralleling this one, that Congress has delegated to the FCC the authority to interpret, in a legally binding fashion, the substantive provisions of the Communications Act. That decision controls this case.

The statutory provision at issue here, Section 332(c)(7)(B), is a substantive provision of the Communications Act that expressly preempts state and local barriers to competitive wireless entry. Among other things, Section 332(c)(7)(B) includes a requirement that local review of a wireless facility siting application be completed in a "reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). In addition, Section 332(c)(7)(B) authorizes any person "adversely affected by" a state or local government's "failure to act" to, "within 30 days after such ... failure

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3. Although Petitioners' argument regarding the FCC's power to issue the *Ruling* appears to be outside the scope of the question on which the Court granted certiorari, they nevertheless urge the Court to address that question and hold, on *de novo* review, that the FCC lacked authority to do so. *See* Br. for Petitioners City of Arlington *et al.* 31-44; Br. for Petitioner Cable, Telecommunications and Technology Committee of the New Orleans City Council 21-25, 32-38. Because Petitioners have elected to argue the merits of the FCC's statutory authority, Intervenor-Respondent Verizon Wireless addresses the issue in support of Respondent FCC and its underlying decision.

to act, commence an action in any court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v).

The question at the heart of this litigation was whether the FCC possesses the authority to interpret the terms "reasonable period of time" and "failure to act" in 47 U.S.C. § 332(c)(7)(B). That question is fully answered by this Court's decision in *Iowa Utilities Board*, which addressed a directly analogous question of FCC authority. There, as here, Congress acted in an area of traditional state control—specifically, local telephone markets. It did so by amending the Communications Act to impose certain duties on local telephone companies to make available wholesale facilities and services to competing carriers, and by prescribing the pricing standards that would apply to those facilities and services. *Iowa Utils. Bd.*, 525 U.S. at 371-73 (discussing 47 U.S.C. § 251 *et seq.*). In the event of disputes, the pricing standards would be applied through arbitration proceedings conducted by state regulatory commissions, subject to challenge in federal district court. *Id.* at 372-73.

Notwithstanding the roles of state governments and federal district courts under the statutory scheme, a feature of Section 332 as well, this Court concluded that the FCC had authority to interpret the pricing standard set out in the statute and to require state regulatory commissions to adhere to its interpretation. *See id.* at 377-78. In so holding, the Court relied principally upon Section 201(b) of the Communications Act, which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The Court found that this provision "means what it says"

and delegates to the FCC the authority to interpret and implement the "substantive" provisions of the Act. *Iowa Utils. Bd.*, 525 U.S. at 378, 380.

The same is true here. Section 332(c)(7)(B) is unquestionably a substantive provision of the Act; it imposes certain limitations on state and local governments when it comes to wireless tower siting. Just as the FCC had authority to interpret the pricing provisions at issue in *Iowa Utilities Board*, it likewise has authority to interpret the standard for timeliness in the provision at issue here.

Petitioners contend that Congress withdrew such interpretive authority from the Commission in Section 332(c)(7)(A). But nothing in Section 332(c)(7)(A) "displace[s]" the Commission's "explicit" authority to interpret and implement Section 332(c)(7)(B). *Iowa Utils. Bd.*, 525 U.S. at 385. Section 332(c)(7)(A) states that, "[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The key phrase in this savings clause is: "[e]xcept as provided in this paragraph." That language only reinforces that the substantive provisions of Section 332(c)(7)(B) do in fact "limit or affect the authority of a State or local government." *See City of Arlington*, 668 F.3d at 250 ("§ 332(c)(7)(A), when it states '[e]xcept as provided in this paragraph,' removes § 332(c)(7)(B)'s limitations from its reach and recognizes those limitations as legitimate intrusions into state and local governments' traditional authority over zoning decisions."). Section 332(c)(7)(A) thus does not limit the effect of the preemption

provisions in subparagraph (B) or the Commission's ability to interpret them. Accordingly, there is no basis for overturning the judgment of the court of appeals, for the FCC ultimately committed no legal error here.

CONCLUSION

For the foregoing reasons, this Court should hold that the *Chevron* framework does not apply to agency determinations of their own authority. Nonetheless, the judgment of the court of appeals should be affirmed because, contrary to Petitioners' assertions, the FCC clearly possessed delegated authority to interpret Section 332(c)(7)(B).

Respectfully submitted,

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RESPONDENT'S BRIEF

Nos. 11-1545 and 11-1547

In the Supreme Court of the United States

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CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, PETITIONER

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QUESTION PRESENTED

Whether, in reviewing an agency's interpretation of its statutory authority, a court should apply the two-part analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 668 F.3d 229. The order of the Federal Communications Commission (Pet. App. 69a-171a) is reported at 24 F.C.C.R. 13,994, and its order denying reconsideration (Pet. App. 172a-195a) is reported at 25 F.C.C.R. 11,157.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2012. Petitions for rehearing were denied on March 29, 2012 (Pet. App. 196a-197a). The petition for a writ of certiorari in No. 11-1545 was filed on June 27, 2012, and the petition in No. 11-1547 was filed on June 22, 2012. The petitions were granted on October 5, 2012, limited to Question 1 in No. 11-1545. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. An effective national wireless telecommunications network requires the construction of numerous communications towers and antennas. Local zoning boards can impede the development of that necessary infrastructure, however, by "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements." H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 94 (1995) (House Report). As a result, "zoning approval for new wireless facilities" has historically been "both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 F.C.C.R. 10,785, 10,833 ¶ 90 (1997).

In 1996, Congress enacted comprehensive telecommunications reform legislation "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) (quoting Telecommunications Act of 1996 (1996 Act), Pub. L.

No. 104-104, preamble, 110 Stat. 56). Part of the 1996 Act was designed to "reduc[e] * * * the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *Ibid.* In that portion of the statute, Congress enacted a "National Wireless Telecommunications Siting Policy," 1996 Act § 704, 110 Stat. 151 (capitalization altered), in order to "speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range [of] options for such services," House Report 94.

The new provision, which Congress made part of the Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities." *City of Rancho Palos Verdes*, 544 U.S. at 115; see 47 U.S.C. 332(c)(7)(B) ("Limitations"). The statute provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government * * * shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). The statute also requires that a state or local government "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. 332(c)(7)(B)(ii). Any person "adversely affected by" a government's "failure to act" on such a request "may, within 30 days after such * * *

failure to act, commence an action in any court of competent jurisdiction." 47 U.S.C. 332(c)(7)(B)(v).

Section 332(c)(7) also includes a savings clause. Entitled "General authority," that provision states that, "except as provided in" Section 332(c)(7), nothing in the Communications Act "shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A); see 47 U.S.C. 332(c)(7) (heading) ("Preservation of local zoning authority").

2. Before the Federal Communications Commission (FCC or Commission) issued the order at issue here, wireless service providers that wished to invoke Section 332(c)(7)'s protections were in an uncertain position. Under the statute, a party seeking to challenge a local government's "failure to act" must file suit "within 30 days after such * * * failure to act." 47 U.S.C. 332(c)(7)(B)(v). The statute, however, provides no clear standard for determining what constitutes a "reasonable period of time" for action, or when a government can be deemed to have "fail[ed] to act" on a request. Absent such guidance, wireless carriers faced the unenviable choice of either waiting for the local government to act, and potentially missing the 30-day window to file suit, or expending resources to file a suit that might be dismissed as premature. See Pet. App. 92a-93a.

In an effort to resolve that dilemma and speed deployment of wireless infrastructure, CTIA—The Wireless Association (CTIA), a trade association of wireless service providers, filed a petition for a declaratory ruling with the FCC to clarify the meaning of "failure to act" in Section 332(c)(7)(B)(v). Pet. App. 71a. In response to CTIA's petition, hundreds of comments were

filed by wireless providers, state and local governments, and other interested parties. See *id.* at 78a-79a, 144a-152a. After reviewing the record, the FCC issued a declaratory ruling granting in part and denying in part CTIA's petition. *Id.* at 69a-171a.

As a threshold matter, the Commission determined that it had "the authority to interpret Section 332(c)(7)." Pet. App. 87a. The FCC noted that Congress had "delegated to the Commission the responsibility for administering the Communications Act," and that several sections of the Communications Act grant the FCC broad authority to implement its provisions. *Id.* at 87a-88a (citing 47 U.S.C. 151, 154(i), 201(b), 303(r)). "These grants of authority," the FCC explained, "necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular." *Id.* at 88a. The FCC further explained that exercise of its authority to interpret Section 332(c)(7) did not contravene that provision's savings clause, see 47 U.S.C. 332(c)(7)(A), because the Commission was not "impos[ing] new limitations" on local zoning authorities, but instead was "merely interpret[ing] the limits Congress already imposed" in Section 332(c)(7) itself. Pet. App. 90a; see *id.* at 134a.

The FCC found that, despite Section 332(c)(7)'s requirement that zoning boards act expeditiously, "personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services." Pet. App. 96a-97a; see *id.* at 98a-102a, 105a-106a. In addition, the agency explained, the delays hindered competition, as wireless providers seeking to provide broadband access struggled to keep

up with their wireline broadband competitors. *Id.* at 102a-105a.

In response to that record evidence, the Commission determined that the public interest would be served by defining the statutory terms "reasonable period of time" and "failure to act" to clarify when an adversely affected provider may seek relief in court under Section 332(c)(7)(B). Pet. App. 106a. The agency concluded that clarification would further the statutory goals by enabling wireless service providers to enforce the statute's protections against unreasonable delays that would otherwise "impede[] the deployment of services that benefit the public." *Ibid.*

In assessing how to define a "reasonable period of time" for processing zoning applications, the Commission focused "on actual practice as shown in the record." Pet. App. 111a. The large majority of zoning authorities that participated in the proceeding stated that they processed applications for wireless collocation (*i.e.*, the addition of one or more antennas to an existing tower or other structure) within 90 days, and applications for other wireless siting requests (involving the construction of a new structure, or a substantial increase in an existing structure's size) within 150 days. *Id.* at 117a-120a. The Commission therefore concluded that "a lack of a decision within [those] timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v)." *Id.* at 115a.

The FCC emphasized that the presumption it described was rebuttable, and it rejected CTIA's proposal that an application pending beyond the deadlines be deemed granted. Pet. App. 106a-108a, 112a. The Commission recognized that "certain cases may legitimately require more processing time," *id.* at 107a, and it stated

that "courts should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications," *id.* at 108a-109a. In addition, the FCC clarified that the time periods could be extended by "mutual consent" of a carrier and local government in the event those entities were "working cooperatively toward a consensual resolution." *Id.* at 120a.

4. After the FCC denied petitions for reconsideration (Pet. App. 172a-195a), the court of appeals denied a petition for review. See *id.* at 1a-68a.

a. The court of appeals rejected petitioners' argument that the savings clause in Section 332(c)(7)(A) "precludes the FCC from exercising authority to implement" Section 332(c)(7). Pet. App. 34a. The court emphasized that it "ordinarily review[s] an agency's interpretation of the statutes it is charged with administering using the *Chevron* two-step standard of review." *Id.* at 35a (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Under that framework, the agency's construction "must be upheld" so long as the statute is "ambiguous" and the agency's construction is "permissible." *Id.* at 35a-36a (citation omitted).

The court of appeals rejected petitioners' contention that "an agency's interpretation of its own statutory authority" should be "subject to de novo review." Pet. App. 36a. In accordance with Fifth Circuit precedent "apply[ing] *Chevron* to an agency's interpretation of its own statutory jurisdiction" (*id.* at 37a-38a n.94), the court applied "the *Chevron* framework" to "determin[e] whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames." *Id.* at 37a.

The court of appeals found that Section 332(c)(7) "is ambiguous with respect to the FCC's authority to establish [those] time frames." Pet. App. 44a-45a. It noted that the FCC has "general authority to make rules and regulations to carry out the Communications Act." *Id.* at 39a (citing 47 U.S.C. 201(b)). The court also stated that "Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC" when it enacted Section 332(c)(7)(B)'s limitations on state authority. *Id.* at 41a-42a. Given that background, the court reasoned, "[h]ad Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly." *Id.* at 41a.

The court of appeals rejected petitioners' contention that Section 332(c)(7)(A) "unambiguously preclude[s] the FCC from establishing the 90- and 150-day time frames." Pet. App. 41a; see 47 U.S.C. 332(c)(7)(A) ("Except as provided in this paragraph, nothing in [the Communications Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."). The court recognized that Section 332(c)(7)(A) "certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a. It held, however, that the savings clause "does not provide a clear answer" as to "[w]hether the FCC retains the power" to use its longstanding administrative authority to implement the limitations established by Subparagraph (B). *Ibid.*

The court of appeals also rejected the argument that, because Congress had given carriers a right of action in

court against local zoning authorities, it must have intended to except Section 332(c)(7) from the FCC's general authority to administer the Act. The court explained that Section 332(c)(7) can reasonably be read as "allowing the FCC to issue an interpretation of [Section] 332(c)(7)B)(ii) that would guide courts' determinations of disputes under that provision." Pet. App. 43a. It therefore found that the statute's "vesting in the courts of jurisdiction over disputes arising under [Section] 332(c)(7)(B)(ii)" did "not unambiguously preclude the FCC from taking the action at issue in this case." *Id.* at 44a.

Having found the Communications Act ambiguous with respect to the agency's authority to construe Section 332(c)(7)(B), the court of appeals upheld as reasonable the Commission's decision to exercise that power. Pet. App. 45a-51a. In reaching that conclusion, the court rejected petitioners' contention that the FCC had no authority to displace state law in this case because Congress had not stated its preemptive intent in unmistakable terms. See *id.* at 48a. The court explained that the federal statute "already preempt[s]" state law "at least to the extent that the state time limits violate [Section] 332(c)(7)(B)(ii)'s requirement that state and local authorities rule on zoning requests in a reasonable amount of time." *Ibid.* Accordingly, the FCC's "action interpreting what amount of time is 'reasonable' under [Section] 332(c)(7)(B)(ii) only further refines the extent of the preemption that Congress has already explicitly provided." *Id.* at 49a.

b. Finally, the court of appeals concluded that "the FCC's 90- and 150-day time frames are based on a permissible construction" of the statute. Pet. App. 54a. The court found that the agency's action reflected a

reasonable response to record evidence "that wireless service providers in many areas of the country face significant delays with respect to their facilities zoning applications." *Id.* at 67a. The administrative record included "a survey of [CTIA's] members indicat[ing] that of the 3,300 wireless siting applications currently pending before local governments, 760 had been pending for more than one year and 180 had been pending for over three years." *Id.* at 65a. In addition, several wireless service providers had filed comments complaining of protracted delays in the processing of their zoning applications. *Id.* at 65a-66a. In the court's judgment, "the FCC properly considered this information" and reasonably "determined that both wireless service providers and zoning authorities would benefit from FCC guidance on what lengths of delay would generally be unreasonable under [Section] 332(c)(7)(B)(ii)." *Id.* at 67a.

SUMMARY OF ARGUMENT

For nearly three decades, courts, agencies, and Congress have relied on the framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), for reviewing agency interpretations of ambiguous statutory language. Petitioners contend that this framework does not apply to agency interpretations of statutory provisions that bear on the scope of an agency's administrative authority. That argument should be rejected.

A. Under *Chevron's* familiar two-part test, where Congress's intent is clear, that intent controls. 467 U.S. at 842-843. If the statute is ambiguous, however, a reviewing court must defer to the agency's reasonable interpretation, even if that interpretation is not neces-

sarily the one the court would have reached on its own. *Id.* at 843-844.

Chevron is based on the recognition that, when Congress leaves a gap or an ambiguity in a statutory scheme that has been entrusted to an agency's administration, Congress has implicitly delegated to that agency the power to reasonably fill the gap or resolve the ambiguity. *Chevron* also reflects this Court's understanding that the resolution of open questions under a statute often requires the application of technical expertise and the balancing of competing policy interests. Unlike courts, agencies are closely familiar with the policies underlying the statutes they implement, and as institutions in one of the politically accountable branches, agencies are entitled to make the policy judgments that may properly inform their reading of a statute.

There is no exception to *Chevron* for interpretive decisions that involve the scope of an agency's statutory authority. To the contrary, this Court has repeatedly applied the *Chevron* framework in reviewing agency interpretations of that character. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 333-341 (2002); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844-845 (1986). That consistent practice reflects the underlying rationale of *Chevron*. An agency's interpretation of provisions defining the scope of its authority is based on an implied delegation by Congress, and can involve the same complex regulatory considerations and rest on the same competing policy concerns that govern any other exercise in statutory construction.

Any attempt to distinguish for *Chevron* purposes between "jurisdictional" and "non-jurisdictional" statutory provisions would be inadministrable in practice. As

Justice Scalia has explained, there is no "discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment). The attempts of petitioners (and of the private respondents who support them) to articulate the line this Court should draw bear out Justice Scalia's observation. Those efforts are both internally inconsistent and at odds with this Court's precedents.

Petitioners contend that agencies will engage in self-aggrandizement if courts apply principles of *Chevron* deference to agency interpretations of "jurisdictional" provisions. The *Chevron* framework, however, is fully adequate to address that concern. If Congress expresses a clear intent to circumscribe an agency's authority, an agency's attempt to exercise broader powers can be rejected at *Chevron* Step One. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

B. Petitioners contend that, in determining whether Congress has carved out discrete exceptions to an agency's general authority to administer a statute, courts must decide de novo whether such exceptions exist. That is incorrect. *Chevron* deference is appropriate whenever an agency administers its organic statute through rulemaking, adjudication, or other actions that carry the force of law. When Congress intends to take the unusual step of withholding an agency's general rulemaking authority from a particular provision of a statute that the agency administers, it would ordinarily do so expressly. See *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613 (1991). An agency's conclusion that an ambiguous provision does not negate its general rule-

making authority is entitled to deference under *Chevron*. See *id.* at 614.

Examination of the statutory scheme at issue here illuminates these principles. The FCC has broad and longstanding authority to administer the Communications Act. It performs that role through such mechanisms as rulemaking and adjudication, in which it speaks with the force of law. Nothing in Section 332(c)(7), or in any other provision of the Communications Act, suggests that Congress carved out Section 332(c)(7)(B)(ii)'s "reasonable period of time" requirement from the FCC's general authority to administer and construe the Act. In any event, the FCC's determination that no such exception exists is reasonable and therefore entitled to deference. See *American Hosp. Ass'n*, 499 U.S. at 613-614.

C. An agency's power to interpret the terms of a statute it administers encompasses federal statutory provisions that displace state law. Congress unambiguously displaced state law in Section 332(c)(7), which "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). When Congress expressly preempts state and local authority, it is free, as in other areas, to leave to the implementing agency the task of resolving any remaining gaps or ambiguities in the scope of that preemption. See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743-744 (1996).

D. The FCC's determination that it had authority to administer Section 332(c)(7) was correct under any standard of review. The FCC has broad power to administer the Communications Act, see *AT&T Corp.* v.

Iowa Utils. Bd., 525 U.S. 366, 378-379 (1999), and nothing in Section 332(c)(7) removes that provision from the scope of the FCC's general administrative authority. That provision's savings clause, on which petitioners principally rely, does not negate the FCC's powers to interpret Section 332(c)(7) itself. Instead, that clause merely provides that *other* portions of the Communications Act should not be construed to impose separate limitations on local zoning authority. And while Congress authorized courts to determine in particular instances whether state or local zoning officials have engaged in unreasonable delay, see 47 U.S.C. 332(c)(7)(B)(v), it did not preclude the FCC from announcing presumptive time frames that will guide that judicial inquiry.

ARGUMENT

CHEVRON APPLIES TO AN AGENCY'S INTERPRETATION OF ITS STATUTORY AUTHORITY

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*), this Court articulated the now-familiar framework for reviewing an agency's interpretation of "the statute which it administers." *Id.* at 842. *Chevron* reflects the Court's recognition that an agency's administration of any statute often entails the interpretation of ambiguous statutory provisions, and that the choice between competing constructions may turn on policy choices that are better made by democratically accountable bodies than by courts. That long-settled framework is fully applicable when an agency construes an ambiguous statutory provision that relates to the scope of the agency's delegated authority.

A. *Chevron* Is Triggered When An Agency Interprets A Statute That Has Been Generally Entrusted To Its Administration

1. Chevron *reflects congressional intent and principles of democratic accountability*

a. *Chevron* "established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996)). As a result of that presumption, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

The interpretation of regulatory statutes routinely involves "reconciling conflicting policies," *Chevron*, 467 U.S. at 865, a task that is more appropriately performed by "legislators or administrators, not * * * judges," *id.* at 864. Judicial deference permits the "political branch of the Government to make such policy choices" by "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-866. Conversely, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 866; see *Brand X*, 545 U.S. at 980 (explaining that the resolution of statutory ambiguities "involves difficult policy choices

that agencies are better equipped to make than courts").[1]

In addition, "[j]udges are not experts" in the "technical and complex" fields that agencies are often charged with overseeing. *Chevron*, 467 U.S. at 865. Agency expertise results not only from the employment of specialized staff, but also from the familiarity with the issues that necessarily results from the agency's day-to-day administration of a statute. Agencies, unlike courts, are also institutionally well situated to engage in the type of broad factual inquiry that may be necessary to a well-informed resolution of a policy dispute. The *Chevron* framework thus rests in part on a recognition that the choice between competing interpretations of ambiguous statutory language often "turn[s] upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency * * * possesses." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 167-168 (2007).

b. The *Chevron* analysis proceeds in two familiar steps. A reviewing court first considers "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. The court, which is the "final

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[1] Respondent Cellco Partnership argues (Br. 23) that principles of *Chevron* deference should not apply to independent agencies like the FCC. That contention is foreclosed by this Court's precedents, which have repeatedly used the *Chevron* framework in reviewing FCC orders. See, *e.g.*, *Brand X*, 545 U.S. at 980; *Iowa Utils. Bd.*, 525 U.S. at 387, 397. While independent agencies like the FCC may be subject to less direct presidential control, they are still more politically accountable than courts, both through congressional oversight and through political appointment of Commissioners. See *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality op.) ("[I]ndependent agencies are sheltered not from politics but from the President.").

authority on issues of statutory construction," "employ[s] traditional tools of statutory construction" to determine whether that standard is satisfied. *Id.* at 843 n.9. "If the intent of Congress is clear, * * * the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843.

"If, however, the court determines Congress has not directly addressed the precise question at issue," it proceeds to Step Two of the *Chevron* analysis. 467 U.S. at 843. In the absence of any clearly expressed congressional intent, "the court does not simply impose its own construction on the statute." *Ibid.* Rather, if the statute is silent or ambiguous with respect to the disputed question, the court must decide "whether the agency's answer is based on a permissible construction of the statute." *Ibid.* At Step Two of *Chevron*, the court defers to the agency's statutory construction so long as the agency's approach "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

The two-step *Chevron* framework ensures that reviewing courts will respect congressional intent. If Congress has clearly expressed its intent, then the court will give it effect. See *Chevron*, 467 U.S. at 842-843. But where Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-844. The "legislative delegation to an agency on a particular question" may also be "implicit rather than explicit." *Id.* at 844. In either circumstance, "a court may not substitute its own construction of a statutory provision for a reasonable

interpretation made by the administrator of an agency." *Ibid.*

2. *This Court has consistently applied* Chevron *to questions of statutory interpretation that bear on the scope of an agency's administrative authority*

In applying the *Chevron* framework, this Court has not recognized any exception for statutory provisions that define the agency's regulatory "jurisdiction." To the contrary, "it is settled law that the rule of [*Chevron*] deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); accord *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 54 (1990) (White, J., dissenting) ("This Court has never accepted [the] argument * * * that *Chevron* should not apply * * * because [the agency's] regulations actually determine the scope of its jurisdiction" under its statute.); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 187 (5th ed. 2010) (Pierce) ("Judging by the Court's pattern of decisions, it seems clear that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.").

The Court has often applied the *Chevron* framework in reviewing agency interpretations of statutory provisions that define the agencies' authority to act. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 333, 341 (2002) (citing *Chevron* and explaining that, if the relevant statutory provisions were ambiguous as to whether the FCC's authority could extend to certain wireline and wireless pole attachments, the Court would defer to the agency's assertion of jurisdiction); *FDA* v. *Brown & Williamson Tobacco*

Corp., 529 U.S. 120, 132 (2000) (applying the *Chevron* framework to analyze the FDA's "assertion of authority," under the Food, Drug, and Cosmetic Act, "to regulate tobacco products")[2]; *Reiter* v. *Cooper*, 507 U.S. 258, 269 (1993) (citing *Chevron* and characterizing as "at least * * * reasonable * * * , and hence * * * binding," the Interstate Commerce Commission's position that the Interstate Commerce Act gave the agency no "jurisdiction" to award reparations); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844 (1986) (according "considerable weight" under *Chevron* to construction of the Commodity Exchange Act by the Commodity Futures Trading Commission (CFTC) on a question that concerned the agency's "power to take jurisdiction" over certain state law counterclaims).[3] The same is true of the Court of Appeals for the District of Columbia Circuit, which, because of its specialized jurisdiction, has more experience applying *Chevron* than any other court of appeals. See *Cellco P'ship* v. *FCC*, Nos. 11-1135, 11-1136, 2012 WL 6013416, at *4 (Dec. 4, 2012) (noting that the D.C. Circuit has "repeatedly" rejected the contention that "*Chevron* deference does not extend to interpretive questions * * * that implicate the scope of an agency's jurisdiction").

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[2] Cf. Br. of Resp. Brown & Williamson Tobacco Corp. 37-38, *Brown & Williamson Tobacco Corp.*, *supra*, No. 98-1152 (contending that *Chevron* was inapplicable because FDA statutory interpretation involved "regulatory expansion of jurisdiction").

[3] Indeed, in *Chevron* itself, EPA's regulatory definition of the ambiguous statutory term "stationary source" dictated when a permit was required, and thus bore on the agency's administrative jurisdiction. 467 U.S. at 840.

3. There is no sound reason for this Court to alter its approach to interpretive questions bearing on the scope of agency authority

This Court has "expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action,'" and it has therefore resisted efforts "to carve out" exceptions to *Chevron*'s applicability. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 713 (2011) (*Mayo*) (quoting *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999)). Consistent with that practice, the Court should reaffirm that *Chevron* deference applies when an agency interprets statutory provisions that define the scope of its administrative authority.

a. The rationales for *Chevron* (see pp. 15-16, *supra*) apply with equal force to questions concerning the scope of an agency's authority. As with any other question of statutory construction, "Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction." *Mississippi Power*, 487 U.S. at 381-382 (Scalia, J., concurring in the judgment). And, contrary to petitioners' contention (*e.g.*, Cable, Telecomms., & Tech. Comm. of the New Orleans City Council Br. 28-29 (New Orleans Br.)), resolution of statutory ambiguities bearing on the scope of an agency's authority will often turn on policy judgments that are more appropriately made by agencies than by courts. See Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 235 (2006) ("If an agency is asserting or denying jurisdiction over some area, it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision.").

In *Schor*, for example, the court of appeals declined to defer to the CFTC's conclusion that it could exercise jurisdiction over state-law counterclaims under the Commodities Exchange Act. 478 U.S. at 844-845. The court of appeals based that holding in part on its view that "the question was not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, had superior expertise." *Ibid.* This Court rejected that reason for withholding deference as "insubstantial," recognizing that "an agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing." *Id.* at 845.

Agencies are also better equipped than courts to collect and evaluate the facts that may bear on the choice between competing interpretations of an agency's governing statute. In this case, for example, the Commission adopted its declaratory ruling after considering hundreds of comments about the costs and benefits of having the Commission define (or refuse to define) the statutory terms "reasonable period of time" and "failure to act." Pet. App. 78a-79a. After reviewing those comments, the FCC concluded that, in the absence of agency guidance, "unreasonable delays" in the consideration of facility siting requests were "impeding the deployment of advanced and emergency services." *Id.* at 96a-97a.

Unlike a single lower court, moreover, an agency can announce an interpretation with nationwide effect, thereby promoting the uniform administration of the policies reflected in the governing federal statute.[4] Such

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[4] In this case, for example, the FCC noted that a circuit split had developed on an interpretive issue involving Section 332(c)(7). See

an interpretation serves one of the core purposes underlying *Chevron* deference. See *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and concurring in the judgment) (explaining that *Chevron* deference is essential "to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies"); cf. *Brand X*, 545 U.S. at 983 (Under *Chevron*, agencies should have authority to revisit "unwise judicial constructions of ambiguous statutes.").

b. An exception to *Chevron* for an agency's interpretations of its statutory authority would be unworkable. As Justice Scalia has explained, "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment). "To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" *Ibid.* A leading administrative law treatise agrees: "courts will routinely encounter intractable characterization problems if they attempt to distinguish between jurisdictional and nonjurisdictional disputes" because "[a]ny good lawyer can make a plausible argument that a high proportion of disputes

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Pet. App. 127a-128a & nn.175-176 (discussing whether a local government could permissibly deny a carrier's facility application on the ground that other carriers were already serving the area). The FCC determined that this split was "appropriately resolved by declaratory ruling," *id.* at 128a, and concluded that local governments could not deny applications solely on that basis, *see id.* at 131a (finding this pro-competition rule most consistent with the statutory purpose of "improv[ing] service quality and lower[ing] prices for consumers").

about the meaning of ambiguous language in agency-administered statutes are jurisdictional disputes." Pierce § 3.5, at 188; accord *Railway Labor Executives' Ass'n* v. *National Mediation Bd.*, 29 F.3d 655, 676 (D.C. Cir. 1994) (Williams, J., dissenting) ("In the absence of a manageable line between jurisdictional and other issues, non-deference for 'jurisdictional' issues is just a tag for the court's conclusion."), cert. denied, 514 U.S. 1032 (1995); Sunstein, 92 Va. L. Rev. at 235 ("[T]he line between jurisdictional and nonjurisdictional questions is far from clear; hence any exemption threatens to introduce more complexity into the world of *Chevron*.").[5]

This case illustrates that difficulty. The FCC has well-established general authority to implement and construe the Communications Act. In arguing that those agency powers do not extend to Section 332(c)(7), petitioners rely on 47 U.S.C. 332(c)(7)(A) (which provides that portions of the Communications Act *other*

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[5] This Court has previously struggled without success to identify a discrete set of administrative-law questions that are uniquely "jurisdictional." In *Crowell* v. *Benson*, 285 U.S. 22, 62-65 (1932), the Court held that agency findings as to "jurisdictional" facts—those on which its power to act "depend[ed]"—must be retried de novo by a reviewing court. The Court viewed that rule as necessary to "confine[]" agencies to their "proper sphere." *Id.* at 65. Subsequent cases, however, illustrated the complexity of any effort to identify uniquely jurisdictional questions in administrative review, and *Crowell*'s attempt to create a special rule for "jurisdictional" determinations by agencies has thus been "undermined." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 82 n.34 (1982) (plurality op.); see *id.* at 110 n.12 (White, J., dissenting); see also Richard J. Pierce, Jr. et al., *Administrative Law and Process* § 5.2.2, at 140 (5th ed. 2009) (jurisdictional fact doctrine "is now moribund," and "[m]odern courts accord to agency findings of facts of this type the same degree of deference they accord to other findings of fact on which the validity of the agency's action depends").

than Section 332(c)(7) should not be construed to restrict state and local zoning authority) and 47 U.S.C. 332(c)(7)(B)(v) (which establishes a judicial remedy when state or local officials fail to act in a timely manner on a wireless siting application). Neither of those provisions, however, refers explicitly to the FCC or to the scope of its regulatory authority. Petitioners thus appear to view as "jurisdictional" any statutory provision that is alleged to render unlawful the agency's chosen course of action. *Chevron* would be largely eviscerated if it were deemed inapplicable to "jurisdictional" provisions so defined.

Respondents International Municipal Lawyers Association, et al. (IMLA) contend (Br. 33) that the line distinguishing "jurisdictional and non-jurisdictional questions * * * is neither illusory nor incapable of judicial administration." In IMLA's view, "agency jurisdiction is a question of *who*, *what*, *where*, or *when* an agency has authority to regulate," in contrast to the "[a]pplication of administrative authority," which "concerns *how* an agency exercises its authority over those subjects within its regulatory realm." *Ibid.* According to IMLA, *Chevron* applies only to agency interpretations of statutory provisions that fall within the "how" category.

IMLA's proposed rule is flatly inconsistent with this Court's precedents. And far from illustrating the ease of differentiating between jurisdictional and non-jurisdictional questions, IMLA's formulation demonstrates the permeability of the line between the two concepts. In *Gulf Power*, for example, this Court stated that the FCC's decision "to assert jurisdiction" over attachments that provide both high-speed Internet access and cable television service, as opposed to those attachments used only for the latter, was entitled to

Chevron deference. 534 U.S. at 333, 342. The disputed issue in *Gulf Power* involved "what" the FCC could regulate—in that case, a particular type of pole attachment. Likewise in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court deferred under *Chevron* to the "exercise [of] jurisdiction" by the Army Corps of Engineers and the Environmental Protection Agency (EPA) over wetlands adjacent to navigable waters. *Id.* at 131-135. In IMLA's proposed taxonomy, the question whether discharges into wetlands are subject to Corps and EPA regulation would naturally be viewed as a "where" or "what" question.

In other settings as well, the Court has applied *Chevron* in a manner inconsistent with IMLA's formulation. See *Mayo*, 131 S. Ct. at 711 (applying *Chevron* to Treasury Department's conclusion that medical residents are not "students" and are therefore subject to taxation under the Federal Insurance Contributions Act—a "who" question); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 394, 398-399 (1996) (applying *Chevron* to NLRB's decision that certain workers were not "'agricultural laborer[s],' a category of workers exempt from the National Labor Relations Act coverage"—another "who" question); *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 453 (1999) (applying *Chevron* to Department of Health and Human Services' determination of the necessary predicate for a hearing before the Provider Reimbursement Review Board—a "when" question).[6]

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[6] The malleability of the proposed line between "jurisdictional" and "non-jurisdictional" questions is highlighted by the City of Arlington's briefs in this case. At one point in its merits brief, Arlington attempts to distinguish "the *scope* of the agency's delegated power" from what it characterizes as the "very different" question it claims

c. Petitioners, and the private respondents who support them, contend that deferring to an agency's determination regarding its statutory authority is unwarranted because doing so "would inevitably lead to the expansion of that authority." Cellco P'ship Br. 22; see New Orleans Br. 30; City of Arlington et al. Br. 28 (Arlington Br.); IMLA Br. 26. Similarly, IMLA argues (Br. 30) that applying *Chevron* to questions of agency authority would "collapse the Constitution's separation of powers" and allow an agency to determine "the limits of its own authority without significant review from another branch." As an initial matter, this Court has applied *Chevron* deference principles to agency decisions *disclaiming* authority to act. See, *e.g.*, *Reiter*, 507 U.S. at 269 (holding that Interstate Commerce Commission's understanding of its governing statute "as giving it no

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is presented here, *i.e.*, "whether Congress ha[s] delegated interpretive authority to the agency," a question Arlington says must be evaluated de novo. Br. 24-25. Elsewhere in its brief, however, Arlington repeatedly collapses the two supposedly "very different" questions, contending that "the determination of the *scope* of an agency's delegated authority is to be conducted by the court *de novo*." *Id.* at 23 (emphasis added); see *id.* at 4, 9, 14, 15, 19, 23, 28, 29 (also characterizing this case as about the "scope" of the agency's authority). Similarly, in its petition for a writ of certiorari, Arlington claimed that the Third, Eighth, and Tenth Circuits, like the Fifth Circuit here, erroneously "resolve jurisdictional questions by applying *Chevron*." Arlington Pet. 14-15. In its merits brief, however, Arlington disclaims the circuit split it asked the Court to resolve in its certiorari petition, now positing that "when presented with the issue in this case—whether Congress delegated interpretive authority—each of those courts decides the question *de novo*." Br. 26 & n.3 (citing decisions from the Third, Fifth, Eight, and Tenth Circuits). Arlington's difficulty in identifying which questions should be classified as jurisdictional is a preview of the administrability problems that would follow from acceptance of its position.

power to decree reparations relief" was "at least a reasonable interpretation of the statute, and hence a binding one" under *Chevron*). Petitioners are therefore wrong in suggesting that application of *Chevron* to agencies' "jurisdictional" determinations will inevitably lead to expansion of agency authority.

In any event, *Chevron*'s two-step framework itself protects against agency usurpation of power not granted by Congress. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9; see pp. 16-17, *supra*. Under *Chevron* Step One, this Court has sometimes set aside agency assertions of authority as inconsistent with the relevant statutory text.

In *Brown & Williamson Tobacco Corp.*, for example, the Court considered (and ultimately rejected) "the FDA's assertion of authority to regulate tobacco products." 529 U.S. at 132. The Court explained that, "[b]ecause this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron*." *Ibid.* The Court nevertheless rejected the agency's construction of the relevant statute under *Chevron* Step One, finding it "clear that Congress intended to exclude tobacco products from the FDA's jurisdiction." *Id.* at 142. In reaching that conclusion, the Court observed that the *Chevron* Step One inquiry was "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133.

Similarly in *Dole* v. *United Steelworkers*, the Court reviewed the disapproval by the Office of Management

and Budget (OMB) of a Department of Labor rule mandating disclosure of information to third parties. Because "the language, structure, and purpose" of the statute in question revealed that Congress did not intend to grant OMB authority to review such a rule, 494 U.S. at 35, the Court declined to defer to OMB's contrary interpretation, *id.* at 42-43 (citing *Chevron*). Conversely, an agency's attempt to disclaim jurisdiction will be rejected where a contrary congressional intent is clear. See, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 529 (2007) (statute "unambiguous" in giving EPA authority to regulate greenhouse gases).

Even at the second step of the *Chevron* analysis, an agency's discretion to interpret its governing statute is hardly "unreviewed or unchecked." IMLA Br. 30. Under Step Two, courts defer to an agency's reading of ambiguous statutory language only if the agency's interpretation is "reasonable." *Chevron*, 467 U.S. at 845. And, under the Administrative Procedure Act (APA), agencies have an obligation to explain the basis for their statutory interpretation, and the agency's actions cannot be "arbitrary" or "capricious." 5 U.S.C. 706(2)(A); see *Judulang* v. *Holder*, 132 S. Ct. 476, 483-484 & n. 7 (2011) (court at *Chevron* Step Two "ask[s] whether an agency interpretation is 'arbitrary or capricious in substance'") (citation omitted).

In sum, "*Chevron* is no blank check to agencies." Sunstein, 92 Va. L. Rev. at 227-228. "It remains the case that agency decisions must not violate clearly expressed legislative will, must represent reasonable interpretations of statutes, and must not be arbitrary in

any way. These constraints produce significant checks on potential agency self-interest and bias." *Id.* at 233.[7]

B. The *Chevron* Framework Applies To The Determination Whether Congress Has Created An Exception To An Agency's Generally-Applicable Administrative Authority

For *Chevron* to apply, an agency's interpretation must be of a "statute which [the agency] administers." 467 U.S. at 842. Moreover, the *Chevron* framework applies only "when it appears that Congress delegated authority to the agency *generally* to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (emphasis added). Contrary to petitioners' submission, these preconditions are satisfied whenever an agency administers its organic statute through rulemaking, adjudication, or other actions that carry the force of law. *Chevron* thus applies when an agency uses rulemaking or adjudication to construe ambiguous language in an affirmative statutory grant of administrative power. *Chevron* likewise applies to an

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[7] Petitioner New Orleans suggests that de novo review is appropriate when an agency interprets "jurisdictional" provisions of its governing statute because the APA "recognizes jurisdiction as a distinct legal inquiry." Br. 46; see IMLA Br. 26 n.4. But while the APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. 706(2)(C), the court has the same power to invalidate agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). In resolving contentions that particular agency actions are "not in accordance with law," courts routinely defer under *Chevron* to agency interpretations of ambiguous statutory language. Nothing in the APA suggests that courts should apply a different standard of review when resolving challenges brought under Section 706(2)(C).

agency's resolution of a claim that a particular statutory provision strips it of its generally applicable administrative authority.

1. When Congress intends to exempt part of an agency's organic statute from the agency's generally-applicable administrative authority, Congress can ordinarily be expected to state that intent explicitly

In *American Hospital Association* v. *NLRB*, 499 U.S. 606 (1991), this Court considered the scope of the general rulemaking authority of the National Labor Relations Board (NLRB). See *id.* at 609 (explaining that the NLRB had express statutory "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the National Labor Relations Act (NLRA)) (quoting 29 U.S.C. 156). As in this case, a party in *American Hospital Association* contended that a separate provision of the NLRA imposed "a limitation on the [agency's] rulemaking powers." 499 U.S. at 611. That challenger argued, in particular, that an NLRB regulation defining bargaining units was ultra vires because Section 9(b) of the NLRA "prevent[ed] the Board" from using its rulemaking authority to "impos[e] any industry-wide rule delineating the appropriate bargaining units." *Ibid.*

This Court squarely rejected that argument. The Court explained that, "[a]s a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted" by 29 U.S.C. 156, the Court "would have expected [Congress] to do so in language expressly describing an exception" from that provision, "or at least referring specifically to the section." *American Hosp. Ass'n*, 499 U.S. at 613; see *Wyoming* v. *USDA*, 661 F.3d 1209, 1270-1271 (10th

Cir. 2011) ("If Congress [when enacting a later statute] had intended to curtail the Forest Service's broad rulemaking authority under [16 U.S.C. 551], it is assumed that it would have at least referenced that provision in some manner."), cert. denied, 133 S. Ct. 144, 417 (2012); *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 394-395 & n.18 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005).

Based on the absence of any express statement of intent to create an exemption to the NLRB's general rulemaking authority, the Court in *American Hospital Association* found it "clear" that Congress had intended no such limitation. See 499 U.S. at 614. The Court went on to state, however, that even if there were "any ambiguity" on the question, the Court "would still defer to the [NLRB's] reasonable interpretation of the statutory text." *Ibid.* (citing *Chevron*, 467 U.S. at 842-843). Accordingly, this Court has already rejected petitioners' argument that *Chevron* does not apply when a party claims that Congress has exempted part of the statute an agency administers from its generally-applicable rulemaking authority.

Contrary to petitioners' contentions, principles of separation of powers and constitutional avoidance have no bearing on the resolution of the present dispute. See Arlington Br. 29; New Orleans Br. 38-39; see also IMLA Br. 28-29. The issue in cases like this one is not whether an agency can exercise a "'legislative' power" to "create regulatory jurisdiction where none existed." Arlington Br. 29 (citation omitted). If Congress wishes to foreclose an agency from exercising regulatory authority over a particular category of matters, it need only make that intent clear, either by defining the agency's affirmative powers in a way that unambiguously excludes the relevant activities, or by enacting a specific

exception to a general grant of regulatory authority. But if the statutory text is ambiguous—either with respect to the scope of the agency's affirmative powers, or with respect to the existence or scope of any carve-out from that authority—the appropriate inference under *Chevron* is that Congress intended the agency to resolve that ambiguity.

Here, for example, Congress has unambiguously vested the FCC with general authority to implement the Communications Act through rulemaking and adjudication. The disputed question is whether Congress has disabled the agency from exercising those general powers to define the term "reasonable period of time" in Section 332(c)(7)(B)(ii). Applying the *Chevron* framework to that question is consistent with the principles that generally govern the interpretation of ambiguous statutory provisions, and it promotes separation-of-powers principles by leaving permissible policy choices to policy-making bodies.

2. Chevron *does not require a provision-by-provision search for delegation*

Petitioners emphasize that no "provision of the Communications Act" gives the FCC an "express delegation of interpretive jurisdiction over Section 332(c)(7)." Arlington Br. 41; see New Orleans Br. 21 (explaining that the "actual language of Section 332(c)(7)" does not include an "affirmative indication * * * on the part of Congress of its intention to delegate interpretive jurisdiction to the FCC") (emphasis omitted). That is true but irrelevant. By vesting the Commission with general authority to implement the Communications Act (see 47 U.S.C. 151, 154(i), 201(b), 303(r)), Congress obviated the need for the sort of provision-specific authorizations whose absence petitioners view as significant.

In some pre-*Chevron* decisions, this Court indicated that agency interpretations should be given greater weight when Congress had included an "explicit delegation of substantive authority" over a particular statutory provision or term than when an agency interpretation was the product of its general rulemaking authority. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981); see, *e.g.*, *Rowan Cos.* v. *United States*, 452 U.S. 247, 253 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 424-425 (1977). But "the administrative landscape has changed significantly" since those cases were decided. *Mayo*, 131 S. Ct. at 713. Under *Chevron* and *Mead*, the "inquiry * * * does not turn on whether Congress's delegation of authority was general or specific." *Id.* at 713-714. Indeed, the Court in *Mayo* identified the Communications Act provisions that vest the FCC with general regulatory authority as a paradigmatic example of provisions that trigger *Chevron* deference. See *id.* at 714 (citing *Brand X*, 545 U.S. at 980-981, 47 U.S.C. 151, 201(b)).

3. Because Section 332(c)(7) includes no express negation of the FCC's general administrative authority over the Communications Act, that general administrative authority remains

The FCC unquestionably "administers" (*Chevron*, 467 U.S. at 842) the Communications Act. See *Brand X*, 545 U.S. at 980 ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act * * * and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act.") (quoting 47 U.S.C. 151, 201(b)); see generally 47 U.S.C. 151 ("[T]here is created a commission to be known as the 'Federal Communications Commission', * * * which shall execute

and enforce the provisions of" the Communications Act). The FCC's authority to administer the Act includes the power to make rules carrying the force of law, both through rulemaking and adjudication. See *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); see generally 47 U.S.C. 151, 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); 47 U.S.C. 201(b), 303(r) (Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Communications Act); see generally Pet. App. 87a-88a.

This Court has consistently applied the *Chevron* framework to both FCC rules, see, *e.g.*, *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007); *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 502 (2002); *Gulf Power*, 534 U.S. at 333, and adjudications, see, *e.g.*, *Brand X*, 545 U.S. at 980-981.[8]

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[8] Like the order at issue in *Brand X*, the order in this case was, as a formal matter, the result of an adjudication. See Pet. App. 83a ("Under Section 1.2 of the [FCC's] rules, the Commission 'may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.'"). As the court of appeals recognized, "[i]t is well-established that agencies can choose to announce new rules through adjudication rather than rulemaking." *Id.* at 18a-19a (citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)). Although the court of appeals questioned the FCC's choice to proceed by adjudication rather than rulemaking in this matter, see *id.* at 22a-25a, the court found that any error in that regard was harmless, see *id.* at 26a-31a (explaining that

In *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), the Court cited the Communications Act as an example of a statute in which the administering agency's delegated authority to speak with the force of law "is clear because the statute gives [the] agency broad power to enforce all provisions of the statute." *Id.* at 258-259 (citing *Brand X*, 545 U.S. at 980); cf. *id.* at 259 (contrasting the Attorney General's "limited powers" and lack of "broad authority to promulgate rules" in administering the Controlled Substances Act).[9]

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the FCC had published notice of CTIA's petition in the *Federal Register* and had received and considered multiple comments). In this Court, petitioners have not renewed their objection to the FCC's use of adjudication.

[9] Petitioners' reliance (*e.g.*, New Orleans Br. 20) on *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), is also misplaced. The respondents in *Adams Fruit* alleged that their employer had violated the motor vehicle safety provisions of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). *Id.* at 640. They sought actual and statutory damages under the AWPA's private right of action for injuries they had allegedly suffered as a result of the violations. *Id.* at 641. In ruling for the employees, the Court in *Adams Fruit* declined to defer to a Labor Department regulation providing that, in specified circumstances, state workers' compensation benefits would be the exclusive remedy for violations of the AWPA. See *id.* at 649. The Court explained that, although the AWPA authorized the agency "to promulgate *standards* implementing AWPA's motor vehicle provisions," that authorization did "not empower the [agency] to regulate the scope of the judicial power vested by the statute." *Id.* at 650 (citing 29 U.S.C. 1841(d)).

Here, by contrast, the FCC's declaratory ruling does not purport to limit the relief a court may award in a private suit brought under 47 U.S.C. 332(c)(7)(B)(v). To the contrary, the Commission recognized that courts in such cases "should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications." Pet. App. 108a-109a. Rather than "regulat[ing] the scope of the judicial power vested by the statute," *Adams*

"Had Congress intended to insulate [Section] 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly because Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC." Pet. App. 41a-42a. Indeed, in a nearby section of the Communications Act, Congress carved out a narrow exception to the statute's general grant of rulemaking authority to the Commission. See 47 U.S.C. 334(a) ("Except as specifically provided in this section, the Commission shall not revise * * * the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees"). The absence of any similar language in Section 332(c)(7) confirms that the FCC's general authority to administer the Communications Act encompasses the implementation of that provision. See *American Hosp. Ass'n*, 499 U.S. at 613. And even if the statute were ambiguous on that point, the Commission's resolution of that ambiguity would be entitled to deference under *Chevron*. See *id.* at 614.

Fruit, 494 U.S. at 650, the FCC's declaratory ruling clarifies the substantive obligations of regulated parties by defining the "reasonable period of time" within which state and local zoning officials must act on wireless siting applications. The declaratory ruling is thus more properly analogized to the promulgation of AWPA motor vehicle standards (which the Court in *Adams Fruit* recognized to be appropriate exercises of agency authority, see *ibid.*) than to the regulation designating state workers' compensation benefits as the exclusive remedy for AWPA violations (to which the Court declined to defer).

C. *Chevron* Applies With Full Force To Agency Interpretations Of Federal Statutes That Limit State Power

Petitioners contend that *Chevron* should not apply in this case because the Commission's reading of Section 332(c)(7)(B) entails an "intrusion on traditional local authority." Arlington Br. 36-38; see New Orleans Br. 36-37; see also IMLA Br. 35-43. That argument lacks merit. Because the FCC action at issue here simply interprets a statutory phrase that explicitly constrains the discretion of state and local zoning authorities, principles of federalism afford no basis for withholding *Chevron* deference.

Section 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." *Rancho Palos Verdes*, 544 U.S. at 115. In particular, Section 332(c)(7)(B)(ii) requires state and local authorities to act on a particular category of siting requests "within a reasonable period of time." In the order at issue here, the FCC merely interpreted those statutory limitations on state and local authority. See Pet. App. 49a.

In *Smiley*, the Court squarely held that principles of *Chevron* deference apply to an agency's interpretation of expressly preemptive statutory language. The Court explained that a contrary argument "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." 517 U.S. at 744. Even assuming that "the latter question must always be decided *de novo* by the courts," the Court explained, that "is *not* the question at issue here." *Ibid.* "As *Smiley* showed, a federal agency's construction of an ambiguous statutory term may clarify the pre-emptive scope of enacted fed-

eral law." *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 555-556 (2009) (Thomas, J., concurring in part and dissenting in part).

If the FCC had not acted to clarify the term "reasonable period of time" as it appears in Section 332(c)(7)(B)(ii), federal courts would have been required to determine in suits brought before them whether that *federal* requirement had been satisfied. Thus, as the court of appeals recognized, the question in this case is not "whether the States [and local governments] will be allowed to do their own thing," but "whether it will be the FCC or the federal courts that draw the lines to which they must hew." Pet. App. 49a n.117 (quoting *Iowa Utils. Bd.*, 525 U.S. at 378 n.6). "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," *Iowa Utils. Bd.*, 525 U.S. at 397, particularly when the statute in question (like the Communications Act) vests the relevant agency with broad general administrative authority. In Section 332(c)(7)(B)(ii), Congress required state and local officials to act on particular zoning requests "within a reasonable period of time," but it enacted no statutory definition of that self-evidently imprecise term. That course can reasonably be understood only as a delegation of authority to the FCC to clarify the applicable timing requirements pursuant to its general power to implement the Communications Act.

D. The FCC's Conclusion That It Has Authority To Promulgate Reasonable Time Limits On Local Zoning Authorities Is Correct Under Any Standard Of Review

Petitioners also argue that the FCC's interpretation of its own statutory authority would be rejected if that interpretation were not subject to the *Chevron* frame-

work. See Arlington Br. 31-44; see also New Orleans Br. 21-25, 32-38. That argument lacks merit.

The statutory provision at issue was enacted as part of the Communications Act of 1934. See 1996 Act §704(a), 110 Stat 151 ("adding" the provision as a new paragraph "at the end" of 47 U.S.C. 332(c)). Pursuant to 47 U.S.C. 201(b), the Commission is generally empowered to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [that Act]." As this Court held in *Iowa Utilities Board*, 525 U.S. at 378, Section 201(b) authorizes the Commission to implement the provisions of the Communications Act—even those, like Section 332(c)(7), that were added by Congress in 1996. This broad grant of authority empowered the Commission to interpret the ambiguous language of Section 332(c)(7)(B). See Pet. App. 41a-42a (In enacting Section 332(c)(7), Congress "surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC."); see also 47 U.S.C. 151, 154(i), 303(r).

In arguing that the FCC's broad authority to administer the Communications Act does not encompass the FCC action at issue here, petitioners rely in part on the savings clause in Section 332(c)(7)(A). The savings clause states that, "[e]xcept as provided in [Section 332(c)(7)], nothing in [the Communications Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). As the court of appeals explained, however, Section 332(c)(7)(A) says nothing about the Commission's authority to *interpret* the limitations that Section

332(c)(7)(B) itself imposes. The savings clause merely "prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a.[10]

As explained above, this Court has recognized that, when Congress intends "to curtail in a particular area the broad rulemaking authority granted" by an agency's general rulemaking provision, the Court would "expect[] [Congress] to do so in language expressly describing an exception" from that rulemaking provision, "or at least referring specifically to the section." *American Hosp. Ass'n*, 499 U.S. at 613. If Congress had intended to except Section 332(c)(7) from the FCC's rulemaking authority under 47 U.S.C. 151, 154(i), 201(b), and 303(r), it could have referred specifically to those provisions, or it could have expressly precluded the Commission from interpreting the provisions of Section 332(c)(7) (or the "reasonable period of time" requirement in particular). Congress did not do so. Cf. 47 U.S.C. 334(a).

Petitioners also maintain that, because Congress intended for courts to resolve disputes regarding particular zoning officials' compliance with 47 U.S.C. 332(c)(7)(B)(ii), the FCC lacks power to construe that

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[10] The FCC explained in the declaratory ruling that, "under the regime that we adopt today, the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." Pet. App. 112a. Thus, even if a state or local zoning authority fails to rule on a particular wireless siting application within the 90- or 150-day period described in the declaratory ruling, a reviewing court may conclude based on all the relevant circumstances that the authority did not fail to act "within a reasonable period of time." See *id.* at 59a, 60a, 62a-63a. That fact makes it particularly clear that the declaratory ruling does not subject state and local officials to obligations going beyond those imposed by the 1996 Act itself.

provision. Arlington Br. 31-32; New Orleans Br. 50-52. This Court rejected a similar argument in *Iowa Utilities Board*. There, the Court upheld the FCC's decision to issue rules governing state commissions' resolution of disputes between telephone companies regarding their statutory duties to interconnect with other carriers, even though the Communications Act provides for judicial review of state commission decisions arbitrating such disputes. The Court explained that Congress's "assignment[ ]" of the adjudicatory task to state commissions did "not logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments." *Iowa Utils. Bd.*, 525 U.S. at 385. Similarly here, the fact that Congress entrusted the resolution of particular disputes to the courts did not preclude the FCC from assisting the courts in that endeavor by exercising its general authority to interpret ambiguous terms of the Communications Act.

Under the rebuttable presumptions established by the agency, the courts remain the ultimate arbiters as to whether a local zoning authority has failed to act on a wireless facility siting application "within a reasonable period of time." As the court of appeals recognized, while Section 332(c)(7)(B)(v) authorizes judicial enforcement of the "reasonable period of time" requirement, it "does not address the FCC's power to administer [Section] 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act." Pet. App. 42a-43a. The FCC's guidance regarding the meaning of Section 332(c)(7)(B)(ii)'s ambiguous terms will not impair the courts' authority under Section 332(c)(7)(B)(v) "to make factual determinations, and to apply those determinations to the law."

United States v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999).

Petitioners also contend that the legislative history supports their view that Congress did not intend for the FCC to interpret Section 332(c)(7)(B). Arlington Br. 32-33. They emphasize that the Conference Report on the legislation directed the FCC to terminate its pending rulemakings. See Pet. App. 209a. It is hardly surprising that Congress discountenanced possible regulatory action that was premised on the pre-amendment Communications Act and that might have undermined the new legislation.[11] Nothing in the Conference Report suggested, however, that Congress intended to displace the settled principle of administrative law that the FCC may resolve ambiguities in the Communications Act, including ambiguities in the new Section 332(c)(7).[12]

Finally, petitioners identify no plausible reason that Congress would have excepted Section 332(c)(7)(B) from

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[11] A petition for rulemaking pending at the Commission when the 1996 Act was enacted asked the FCC to preempt state and local governments from enforcing zoning restrictions that inhibited construction of wireless infrastructure. That petition argued that the Commission had authority to do so under pre-1996 Act provisions of the Communication Act: 47 U.S.C. 332(a) and 332(c)(3)(A) (1994). See Cellular Telecomms. Indus. Ass'n's Pet. for Rule Making 4-5 (1994).

[12] Petitioners assert that Congress did not intend "to give preferential treatment" to zoning applications filed by wireless telecommunications providers. Arlington Br. 33 (quoting Pet. App. 210a). But no zoning applicants other than wireless service providers have a federally enforceable right to receive a ruling on their applications "within a reasonable period of time." 47 U.S.C. 332(c)(7)(B)(ii). And "nothing in the FCC's time frames necessarily requires state and local governments to provide greater preference to wireless zoning applications than is already required by [Section] 332(c)(7)(B)(ii) itself." Pet. App. 61a.

the Commission's general authority to construe ambiguous provisions of the Communications Act. Based on its pre-existing expertise and on the information it acquired through the notice-and-comment process, the FCC was clearly better positioned than any court to determine what period of time is generally "reasonable" for acting on wireless siting applications. By identifying periods of time for acting that the expert agency views as presumptively reasonable, and by bringing greater consistency and predictability to judicial interpretations of the "reasonable period of time" standard, the declaratory ruling should serve the interests of applicants, regulators, and courts alike. The Commission's issuance of the declaratory ruling thus serves precisely the interests that the agency's gap-filling authority under the Communications Act is generally intended to further. If the agency were disabled from construing Section 332(c)(7)(B)(ii), by contrast, each court adjudicating a suit brought under Section 332(c)(7)(B)(v) would be required either to assess the defendant's "reasonableness" without reference to the practices that generally prevail in this context, or to attempt to replicate the inquiry that the FCC conducted. There is no evident reason that Congress would have preferred either of those approaches to the one that the Commission adopted.[13]

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[13] In recently enacted legislation, Congress again imposed limitations on local zoning authority related to wireless infrastructure. In the Middle Class Tax Relief and Job Creation Act of 2012, Congress provided that "[n]otwithstanding" Section 704 of the 1996 Act (which added Section 332(c)(7)) or "any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." Pub. L. No. 112-96, § 6409(a)(1), 126

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Stat. 232; see *id.* § 6409(a)(2), 126 Stat. 232-233 (defining "eligible facilities request" as "any request for modification of an existing wireless tower or base station that involves," among other things, "collocation of new transmission equipment" or "replacement of transmission equipment"). Although Congress did not insert that 2012 provision into the Communications Act, it nonetheless provided that, with exceptions not relevant here, "[t]he Commission shall implement and enforce [the title of the 2012 statute in which the new zoning provision appears] as if [that] title is a part of the Communications Act of 1934." *Id.* § 6003(a), 126 Stat. 204. There is no reason to think that Congress would have provided the FCC with authority to implement this new zoning restriction if it had previously divested the agency of authority to implement the obviously related restrictions in Section 332(c)(7). It is also telling that the mechanism Congress chose to give the FCC implementation authority was not a section-specific provision, but instead treatment of the new provision "as if" it was in the Communications Act, thus triggering Section 201(b) and the other sources of the agency's general administrative authority.

APPENDIX

1. 47 U.S.C. 151 provides:

Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

2. 47 U.S.C. 154(i) provides:

Federal Communications Commission

* * * * *

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

* * * * *

3. 47 U.S.C. 201(b) provides:

Service and charges

* * * * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such con-

tract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

4. 47 U.S.C. 303(r) provides:

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

5. 47 U.S.C. 332 provides:

Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by

reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commis-

sion shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking re-

quired to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of

telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including

any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government

or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll

services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

REPLY BRIEF

Nos. 11-1545 and 11-1547

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS CITY OF ARLINGTON ET AL.

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REPLY BRIEF FOR PETITIONERS CITY OF ARLINGTON ET AL.

In 47 U.S.C. § 332(c)(7), Congress enacted outer boundaries on "regulation of the placement, construction, and modification of personal wireless facilities," but otherwise left state and local governments the flexibility to apply their ordinary rules governing zoning and construction. The FCC claims that Congress delegated to it the power to authoritatively interpret Section 332(c)(7). On that basis, the FCC claims the power to require that local zoning processes facilitate national telecommunications policy.

Petitioners challenge the FCC's threshold assertion that it possesses this "interpretive jurisdiction" over Section 332(c)(7) – *i.e.*, the final authority to resolve ambiguities in the statute's meaning. This Court granted certiorari to decide *how* a court should evaluate such a dispute. The government argues, and the Fifth Circuit held, that courts must defer to an administrative agency with respect to every assertion of authority that implicates the agency's "jurisdiction." On that view, the agency has the power to interpret the statute unless Congress enacts an express, jurisdiction-stripping provision. U.S. Br. 18-19, 31-32.

By contrast, petitioners argue that mere ambiguity (much less silence) cannot grant an agency this sweeping interpretive power. Rather, a court determines *de novo*, using ordinary tools of statutory construction, whether Congress intended to grant the agency interpretive authority over the

provision in question. The agency's view remains relevant, but only to the extent of its power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The government and certain other parties and *amici* urge this Court to apply a uniform rule to govern the review of all agency assertions of any type of "jurisdiction." By contrast, we suggest that the Court proceed incrementally and address only the distinct form of "jurisdiction" actually presented by the case: an agency's power to interpret a statutory provision authoritatively. Because that power is a "precondition" to the two-stage *Chevron* framework, *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990), the academic literature often labels its determination "*Chevron* Step 0," *e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 912-13 (2001).

The Court can address other forms of agency "jurisdiction" in cases in which they are actually implicated. The Court should not let itself be drawn into such disputes unnecessarily by the government's broader regulatory agenda, and it is unclear that those cases will all be resolved through an invariable rule in which the label "jurisdiction" *ipso facto* determines the outcome. This case instead involves the long-established and easily identified question of an agency's "interpretive jurisdiction" – here, whether Congress gave the FCC the power to interpret Section 332(c)(7) authoritatively. That question plainly is decided *de novo*. The judgment of

the court of appeals can and should be reversed on that basis.[1]

I. The Fifth Circuit Erred In Holding That Courts Defer To Agencies' Assertion Of Interpretive Jurisdiction.

The government defends the Fifth Circuit's categorical holding that courts defer to an administrative agency's interpretation of any statutory provisions that "define the agenc[y's] authority to act." U.S. Br. 18. But the government's theory is unclear and inconsistent. Most of its arguments sweepingly assert as an absolute principle of administrative law that Congress always intends every agency to decide any matter that can be called "jurisdictional," including even an agency's claim that it possesses interpretive authority over a statute. *E.g.*, *id.* 32 ("But if the statutory text is ambiguous – either with respect to the scope of the agency's affirmative powers, or with respect to the existence or scope of any carve-out from that authority – the appropriate inference under *Chevron* is that Congress intended the agency to resolve that ambiguity."); *see also id.* 11, 12, 14, 20, 22, 29

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[1] Petitioners do not "disclaim[] the circuit split" described by the petition for certiorari. U.S. Br. 26 n.6. Acknowledging the circuit split, the Fifth Circuit resolved this case by applying an across-the-board rule that all agency determinations of "jurisdiction" receive *Chevron* deference. Pet. App. 36a-37a. In deciding the case, this Court could itself adopt a categorical rule. But for the reasons given in the text, petitioners believe that the case can and should be decided more narrowly.

(similar). But at other times – and particularly in the headings of its brief – the government suggests that its position is limited to cases in which "an agency interprets a statute that has been generally entrusted to its administration." *Id.* 15; *see also id.* 29. Broadly or narrowly drawn, the argument reduces to the erroneous claim that an agency may decide its own authority to implement a statute.

A. The Government Errs In Asserting That Agency Assertions Of Interpretive Jurisdiction Trigger *Chevron* Deference.

1. The government's first, broad theory is that every agency is entitled to deference with respect to every assertion of jurisdiction, including the agency's assertion that Congress granted it interpretive authority. That claim is obviously irreconcilable with this Court's precedents. It is settled that a court determines an agency's interpretive jurisdiction *de novo*. *See* Pet. Br. 19-23 (collecting cases). An agency receives deference only when exercising authority delegated by Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). The Fifth Circuit's contrary holding puts the cart before the horse: it assumes the conclusion that Congress intended courts to defer to the agency's views. In many cases, it will be obvious that Congress did give the agency that authority, but the question must first be asked.

The government's contrary claim that the Court's "consistent practice" has been to apply *Chevron* deference to all questions of agency "jurisdiction," U.S. Br. 11, is inexplicable. In at least

seventeen cases, this Court has determined an agency's interpretive jurisdiction *de novo*. *See* Pet. Br. 19-23. Faced with our unequivocal representation that "this Court has *never* deferred to the agency's view that Congress intended to delegate it authority," *id.* 19, the government persists that it is "settled" that the Court always defers to every agency interpretation of any ambiguous jurisdictional provision, U.S. Br. 18. But it cites no majority opinion of this Court. Instead, it invokes a concurrence and a dissent, both more than twenty years old. *Id.* (citing *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 54 (1990) (White, J., dissenting)). That imbalance in authority speaks for itself, and the reason for it is obvious: the government has no answer to petitioners' showing that those separate opinions address only other forms of agency power, not the antecedent determination of the agency's interpretive jurisdiction. *See* Pet. Br. 24-25 & nn.1 & 2.

2. Much of the government's brief is devoted to the proposition that *Chevron* deference attaches to those other, distinct "jurisdictional" assertions by agencies. But the only reason it gives that those arguments are relevant to this case is that it would be "inadministrable" and "unworkable" to distinguish between assertions of agency authority. U.S. Br. 11, 22. That claim is not only mistaken, *see, e.g.*, IMLA Open. Br. 33-35, but also depends on lumping together very different issues related to agencies' authority under the heading "jurisdiction," which is a word with "many, too many, meanings."

Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen, 130 S. Ct. 584, 596 (2009).

In fact, there is an obvious distinction between the threshold question of interpretive jurisdiction and other issues relating to an agency's "authority to act." U.S. Br. 18. Take this case. Neither the FCC's declaratory ruling, nor the Fifth Circuit's decision, nor the government's brief had the slightest trouble identifying the agency's power to interpret Section 332(c)(7) as a distinct inquiry. *See* U.S. Br. 5 ("As a threshold matter, the Commission determined that it had 'the authority to interpret Section 332(c)(7).'" (quoting Pet. App. 87a)); *id.* 9 ("Having found the Communications Act ambiguous with respect to the agency's authority to construe Section 332(c)(7)(B), the court of appeals upheld as reasonable the Commission's decision to exercise that power." (citing Pet. App. 45a-51a)); *id.* 11, 12, 23, 29, 31-32, 33-34, 36, 38, 39 (all recognizing the question of an agency's power to interpret a statute as a distinct issue).

B. The Government Errs In Claiming That An Agency's General Regulatory Authority Empowers It To Determine Its Interpretive Jurisdiction Over A Statutory Provision Such As Section 332(C)(7).

1. This Court's precedent equally precludes the government's contention that an agency with general regulatory authority over a statute is automatically entitled to *Chevron* deference when it asserts interpretive jurisdiction over an individual provision of that statute. This Court has decided several cases

that fit that precise fact pattern; each addressed the agency's authority *de novo*. The government is unable to identify any decision supporting its contrary view.

In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Court considered two distinct challenges to FCC regulations implementing the local-competition provisions of the 1996 Telecommunications Act: (i) that Congress did not authorize the FCC to interpret those provisions (*i.e.*, that the agency lacked interpretive jurisdiction); and (ii) that if the FCC did have that interpretive authority, its regulations nonetheless conflicted with the statute. The government argued that the agency's general regulatory authority under the Act entitled it to *Chevron* deference with respect to both claims, including the FCC's threshold determination that it had interpretive authority over the provisions of the 1996 statute. *See* U.S. Br. 42 (arguing that agency's assertion of interpretive jurisdiction should be sustained because, "[e]ven if there were some ambiguity in those provisions, the Commission's interpretation of them would be entitled to substantial deference, for 'it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction.'" (quoting *Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment)); *id.* 48.

But this Court did not accept that argument. Instead, every member of the Court addressed the agency's authority to implement the local-competition provisions – which the majority (per Scalia, J.) described as "underlying FCC jurisdiction"

– *de novo*. *See* 525 U.S. at 377-85; *id.* at 407-12 (opinion of Thomas, J., dissenting). So the government's quotation (Br. 15) of this Court's statement in *Iowa Utilities* that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," 525 U.S. at 397, is misleading. That quotation actually refers to the Court's resolution of the substantive challenge to the FCC's regulations, which the Court reached only after its antecedent, *de novo* determination that Congress delegated to the FCC the power to interpret the provisions added by the 1996 Act. *See, e.g.*, *id.* at 387, 392, 395, 396 (after addressing agency's interpretive jurisdiction *de novo*, finding that FCC's reading of definition of "network element" was "eminently reasonable"; that rule on separation of network elements was "well within the bounds of the reasonable"; and that "pick and choose" rule was "not only reasonable, it is the most readily apparent"; but FCC had not interpreted the statute "in a reasonable fashion" in adopting rules on "necessary and impair" standards).

Likewise, in *United States v. Mead*, 533 U.S. 218 (2001), the Court recognized the "general delegation to [the Treasury] Secretary to issue rules and regulations for the admission of goods." *Id.* at 222 (citing 19 U.S.C. § 1624). But notwithstanding that "general rulemaking power," the Court considered *de novo* whether the specific statutory provisions relating to classification rulings indicated that "Congress meant to delegate authority to Customs" to act with the force of law. *Id.* at 231-32.

And in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), the statute at issue (the Migrant and Seasonal Agricultural Worker Protection Act) gave the Secretary of Labor broad authority to "issue such rules and regulations as are necessary to carry out" the Act. 29 U.S.C. § 1861. The Court nevertheless considered *de novo* the agency's authority to interpret the scope of the statute's private right of action and held that the agency lacked the power "to regulate the scope of the judicial power vested by the statute." *Adams Fruit*, 494 U.S. at 650.

The government's position cannot be reconciled with *Iowa Utilities*, *Mead*, or *Adams Fruit*. It nonetheless argues (Br. 30-31) that its theory is supported by *American Hospital Association v. NLRB*, 499 U.S. 606 (1991). But *American Hospital* is a *Chevron* Step 1, not Step 0, case. No one disputed that the agency (the National Labor Relations Board) had the authority to interpret the relevant statutory provision, which addressed bargaining units. Instead, the petitioner maintained that the Board's regulation specifying the number of bargaining units in acute care hospitals substantively conflicted with a provision of the statute requiring that the Board make a bargaining unit determination "in each case." 29 U.S.C. § 159(b). The question was thus not the Board's interpretive jurisdiction (*i.e.*, whether its regulatory authority reached the statutory provision addressing the number of bargaining units), but whether the substance of its regulation was compatible with Section 159(b).

The government also quotes two statements by this Court that a "general" delegation of rulemaking authority triggers *Chevron* deference with respect to rules validly promulgated pursuant to that authority. U.S. Br. 29, 33. That is both uncontroversial and irrelevant: the delegation may be general or specific, but its meaning is always determined *de novo*. Neither statement suggests, and this Court has never held, that such general authority entitles the agency to deference regarding whether Congress intended that general authority to extend to a particular statutory provision such as Section 332(c)(7). To the contrary, in one of the two cases, the Court determined *de novo* that the challenged regulation did not fall within the agency's rulemaking authority. *Mead*, 533 U.S. at 231-34.

2. The FCC's argument that its general power to interpret the Communications Act implies the further authority to decide whether it may authoritatively interpret Section 332(c)(7) violates the cardinal rule that an agency cannot "bootstrap" itself into its own jurisdiction. *Adams Fruit*, 494 U.S. at 650 (citation omitted). Put another way, the FCC's argument begs the question presented by this case: is Section 332(c)(7) subject to the agency's general interpretive authority?

The government's argument also makes no sense as a presumption of congressional intent. *Chevron* rests on the sensible understanding that when Congress decides to delegate interpretive authority to an agency, it then expects the agency to apply its expertise to fill in gaps in the relevant statutory provisions. But the government's

argument would erect a radically different presumption: that Congress intends agencies to decide whether they or instead the courts have final interpretive authority to resolve ambiguities in statutes, with the consequence that the agency has interpretive authority unless Congress expressly withdraws it. That is an unsound assumption, because it does not reflect Congress's actual practice. Indeed, we are unaware of *any* statute in which Congress has expressly given an agency the power to determine whether it has interpretive authority over a statute. So there is no reason to believe that Congress would do so impliedly, as the government's reliance on the ambiguity of Section 332(c)(7) necessarily presumes.

Nor is this the type of technical question that Congress would expect to be decided by an agency rather than a court. To the contrary, as the seventeen precedents set forth in our opening brief illustrate, reading a statute to determine whether Congress delegated interpretive jurisdiction to an agency is a quintessential judicial task, calling for an ordinary exercise of statutory construction.

The government's claim that this case proves the opposite is very misleading. According to the government, after receiving hundreds of comments, "the FCC concluded that, in the absence of agency guidance, 'unreasonable delays' in the consideration of facility siting requests were 'impeding the deployment of advanced and emergency services.'" U.S. Br. 21 (Pet. App. 78a-79a, 96a-97a). But the quoted analysis is *not* in the relevant part of the FCC's ruling – its parsing of its own "[a]uthority to

[i]nterpret [s]ection 332(c)(7)" (*see* Pet. App. 84a-87a) – in which the agency addressed the statute and precedents of the agency and courts. Instead, the agency made the policy judgments quoted by the Solicitor General only *after* finding that it had interpretive authority over Section 332(c)(7), then turned to establishing the substantive "[t]ime for [a]cting on [f]acility [s]iting [a]pplications." *See* Pet. App. 92a-124a.

Further, the determination of interpretive jurisdiction amounts to the allocation of power between the branches of government. It determines whether ambiguities in the statute's meaning will be resolved by courts or by the Executive Branch. Our constitutional structure entrusts those allocative decisions to the neutral judiciary, not agencies burdened by the self-interest of the opportunity to expand their own power. The government's startling argument that instead permitting the Executive Branch to make those decisions "promotes separation-of-powers principles by leaving permissible policy choices to policy-making bodies," U.S. Br. 32, is nothing less than an assault on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Indeed, it is not clear that Congress *could* delegate this authority to an administrative agency, consistent with the nondelegation principle that only Congress may exercise the Article I legislative powers. *See* Pet. Br. 29. The government's position permits the Executive Branch to make the quintessentially legislative judgment that the Executive rather than the courts will be the final arbiters of the meaning of ambiguous statutory

terms. But the Solicitor General has not identified any historical precedent for such a practice. Whatever the ultimate outcome of that constitutional question if Congress were ever to delegate interpretive authority expressly, here the Court should follow its "settled policy" of construing statutes to avoid potential constitutional invalidation by finding no delegation implicit in Section 332(c)(7). *Gomez v. United States*, 490 U.S. 858, 864 (1989).

The Solicitor General also significantly understates the prospect that his fellow members of the Executive Branch will use this claimed authority to aggrandize power to themselves. Given the choice, an agency would rarely disclaim the authority to finally resolve ambiguities in a statute. The agency might choose not to exercise that power in a particular case, but it rarely would deny its existence outright. In fact, the government does not identify any decision of this Court in which an agency ever did so. Its citation to one twenty-year-old decision, which involved a 1969 ruling of the long-since-disbanded Interstate Commerce Commission, is inapt. Br. 26 (citing *Reiter v. Cooper*, 507 U.S. 258, 269 (1993)). In even that one case, the Commission did not decide it lacked authority to interpret the provision; that issue was not before the Court. Rather, the issue was whether under the relevant statute the courts or the ICC had the "power to decree reparations relief." *Reiter*, 507 U.S. at 269.

The government finally says that for Congress to prevent an agency from seizing the final interpretive

authority over a statute, "it need only make that intent clear, either by defining the agency's affirmative powers in a way that unambiguously excludes the relevant activities, or by enacting a specific exception to a grant of regulatory authority." U.S. Br. 31-32. That is all: just perfect clarity in every instance. In addition to its other flaws, the government's position certainly does not reflect how Congress actually writes laws. And in turn, the government's theory squarely conflicts with this Court's holding that the determination of whether an agency's position is consistent with a statute is made on the basis of "traditional tools of statutory construction," U.S. Br. 17 (quoting *Chevron*, 467 U.S. at 843 n.9), not *per se* rules. *See Mead*, 533 U.S. at 229-31; *see also, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134 (2000) (FDA lacked the authority to regulate cigarettes despite the absence of any express limitation); *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) (Attorney General had limited authority to implement the Controlled Substances Act even absent express congressional limitation); *Rapanos v. United States*, 547 U.S. 715, 751-52 (2006) (although Congress had refused to limit the Army Corps of Engineers' authority under the Clean Water Act, a limitation nevertheless existed in the terms of the statute).

The Fifth Circuit accordingly erred in deferring to the FCC's assertion that it possesses the final interpretive authority to resolve ambiguities in Section 332(c)(7), rather than deciding that question *de novo*.

II. This Case Illustrates That Interpretive Jurisdiction Is Properly Determined *De Novo*.

The government asserts that the FCC has interpretive jurisdiction over Section 332(c)(7) because Congress did not expressly bar the agency from invoking its general authority to implement the Communications Act. On that view, the role of Section 332(c)(7) is not to grant state and local governments the flexibility to account for local conditions within the outer bounds specified by Congress, but rather to grant the FCC the sweeping power to use Section 332(c)(7) as a tool to implement the broader policies it believes are embodied throughout the Act. Thus, although the FCC characterizes its existing ruling as modest, the agency could presumably go much further and provide for a mandatory fifteen-day review period for wireless siting requests. Telecommunications companies have also urged the FCC to conclude that it has jurisdiction to rule that an application will be deemed granted if not timely acted upon. Pet. App. 108a-09a.

The FCC's arguments fail on the merits and illustrate why courts must determine the scope of agencies' interpretive jurisdiction *de novo*, rather than deferring to the agencies' self-interested judgments expanding their own power. Manifestly, none of the government's arguments – which are based on the statute, its legislative history, and this Court's decisions – relate to technical matters that Congress would expect to be resolved by the FCC, not a court. Although the government's reading of

the statute survived the Fifth Circuit's deferential review because it was not "impermissible," Pet. App. 51a, the FCC's broad assertion of interpretive authority is not the statute's best reading.

1. The government asserts that its interpretation follows from the holding of *Iowa Utilities* that the FCC's general regulatory authority applies to two provisions added by the 1996 Telecommunications Act. But as discussed in Part I, *supra*, the government's argument fails to acknowledge that this Court determined the FCC's authority to implement those provisions *de novo*, not deferentially. This Court did not accept – and it makes no sense to conclude – that Congress left to the FCC the decision whether the FCC had that interpretive authority.

Furthermore, *Iowa Utilities* did not adopt a categorical rule that every provision added to the Communications Act is subject to the FCC's general regulatory authority absent an express contrary statement by Congress. As the majority acknowledged, the FCC's interpretive jurisdiction "assuredly" turns (525 U.S. at 378 n.5) on "what th[e] later enacted statute contemplates" (*id.* at 420 (Breyer, J., concurring in part and dissenting in part)). The provisions at issue in *Iowa Utilities* – 47 U.S.C. §§ 251 and 252 – created a uniform federal regulatory regime in which the states could participate or not at their discretion. Recognizing that "a federal program administered by 50 independent state agencies is surpassing strange" (525 U.S. at 378 n.6), the Court found no reason to "speculat[e]" (*id.* at 378 n.5) that Congress intended

those provisions to not be subject to the FCC's general regulatory authority.

Section 332(c)(7) is very different. It preserves local authority rather than enacting a federal regulatory program. Section 332(c)(7) provides in its very first sentence that "nothing" else in the Communications Act "shall limit or affect" state and local zoning authority. That is not a "savings clause" that "merely provides that other provisions of the Communications Act should not be construed to impose separate limitations on local zoning authority." U.S. Br. 14 (emphasis omitted). By its terms, the exclusion in Section 332(c)(7) reaches the FCC's general regulatory authority – which is set forth in Sections 1, 4(i), 201(b), and 303(r) of the Act – as well as the agency's policy in favor of speeding the deployment of wireless facilities. Thus, the FCC's adoption in this proceeding of its "shot clock" rule – which mandates expedited decisions on wireless siting applications – certainly "affect[s]" local authority, as would of course the many other rules the agency could presumably enact pursuant to its claimed interpretive authority. *See* Black's Law Dictionary 92 (8th ed. 2004) (to "affect" is "to produce an effect on; to influence in some way").

The FCC's contrary interpretation effectively nullifies Section 332(c)(7)'s prohibition on invoking other provisions of the act that "affect" state and local rulemaking. That provision must be read "to preserve the primary operation of" the exclusion. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). The government fails to explain how it reads the exclusion, but presumably interprets it

merely as a formal prohibition on a court expressly invoking other provisions of the Communications Act to limit state and local wireless siting authority. In practice, however, the government would render the exclusion a dead letter by permitting the FCC by rule or order to pursue all the "policies" embodied in those otherwise-excluded provisions of the Act. *See, e.g.*, Pet. App. 103a-106a (FCC ruling explaining that deadlines were intended to further build-out requirements for 700 MHz spectrum, advance wireless 911 services, and promote advanced services under another statute entirely, the Recovery Act).

The statute's structure reflects, however, that when Congress wanted to subject this area of traditional state and local authority to FCC rulemaking, it said so expressly. In the 1996 Act, Congress both authorized the FCC to undertake a rulemaking on the effects of "radio frequency emissions" (110 Stat. 56 § 704(b)) and provided in Section 332(c)(7)(B)(iv) that "the Commission's regulations" take precedence over contrary state and local regulation.

The statutory history is equally instructive. Congress considered an earlier House alternative that would have provided for an FCC rulemaking to establish a "policy" to ensure that state and local governments acted "within a reasonable period of time after the request is fully filed." Pet. App. 213a. But Congress instead enacted the very different provisions of Section 332(c)(7), which forbids the FCC from resorting to other provisions of the Communications Act. Yet the FCC reads the statute

to impose the mandate from the House bill that Congress determined not to adopt.

The essence of Section 332(c)(7) is thus to recognize and embrace a principally state and local regulatory regime for wireless siting decisions, in contrast to the broader national regime contemplated by provisions of the Communications Act like those considered in *Iowa Utilities*. Congress did not intend to allow the FCC to require Arlington, Texas to follow the same timetables for zoning decisions as Arlington, Virginia. Rather, the statute requires each state and local government to honor *its own* zoning policies, without targeting cell tower applications for unique, hostile treatment in the form of bans, discrimination, and delays. *Town of Amherst v. Omnipoint Comm'ns Enters.*, 173 F.3d 9, 17 (1st Cir. 1999) (Congress conceived that this "experiment in federalism" would produce "at some cost and delay for the carriers" individual solutions "best adapted to the needs and desires of particular communities"); Pet. App. 210a (Conference Report) ("It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision."). But the government's reading turns the statute on its head, converting it into a tool for national policymaking by the FCC.

The relevant precedent is accordingly not *Iowa Utilities*, but instead *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which our opening brief cited seven times yet the government

completely ignores. Just as Section 332(c)(7)(A) provides that "nothing in this Act shall limit or affect" state and local wireless siting authority, the provision in that case (Section 152(b)) stated that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" interstate communications services. Addressing the question *de novo*, this Court held that "this provision fences off from FCC reach or regulation intrastate matters," and takes precedence over any other "provision declaring a general statutory purpose." 476 U.S. at 370. Congress notably enacted Section 332(c)(7)'s exclusionary "nothing in this chapter" provision against the backdrop of this Court's ruling in *Louisiana Public Service Commission*.

The government's reliance on *Iowa Utilities* is also flawed because Section 332(c)(7)'s judicial review provision makes this case better analogized to *Adams Fruit*. As discussed, the statute in that case gave the Secretary of Labor sweeping authority to "issue such rules and regulations as are necessary to carry out" the Act. 29 U.S.C. § 1861. But this Court held that power did not include the authority to interpret the private right of action under the statute, because Congress had not authorized the Secretary to "regulate the scope of the judicial power vested by the statute." *Adams Fruit*, 494 U.S. at 650. Section 332(c)(7) has a parallel structure. Congress gave enforcement authority over Section 332(c)(7) to the courts, and specifically withheld that authority from the FCC. 47 U.S.C. § 332(c)(7)(B)(v).

Nor can it be seriously argued that the statute requires FCC implementation. For the thirteen years prior to the FCC's assertion of interpretive jurisdiction in this ruling, the judiciary applied the statute without difficulty. The courts read Section 332(c)(7) to preserve state and local zoning requirements rather than to require a national zoning regime. *See, e.g.*, *Aegerter v. City of Delafield*, 174 F.3d 886, 892 (7th Cir. 1999) ("Some may disagree with Congress's decision to leave so much authority in the hands of state and local governments to affect the placement of the physical infrastructure of an important part of the nation's evolving telecommunications network. But that is what it did when it passed the Telecommunications Act of 1996, and it is not our job to second-guess that political decision."). No court read the statute to impose national administrative standards, much less "attempt[ed] to replicate the inquiry that the FCC conducted" of calculating national averages. U.S. Br. 43; *see, e.g.*, *N.Y. SMSA Ltd. P'shp v. Town of Riverhead Town Bd.*, 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000); *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190, 198 (D.R.I. 2000). The FCC's ruling in this case thus unavoidably overturns many prior court decisions. *See, e.g.*, U.S. Br. 40 n.10.

2. The government's claim that its interpretation nonetheless represents the best reading of Section 332(c)(7) is unconvincing. And again, none of its arguments addresses a matter within the special technical competence of the FCC, as opposed to a question of statutory construction for which courts rather than agencies are better suited.

Principally, the government invokes the FCC's general regulatory authority over the Communications Act. But Congress would not have thought those provisions would override Section 332(c)(7)'s express provision that "*nothing*" else in the Communications Act may "affect the authority of a State or local government." 47 U.S.C. § 332(c)(7)(A) (emphasis added). Contrary to the government's submission, no principle of statutory construction imposes on Congress the burden to separately identify and negate each source of regulatory authority and policy that the agency might someday invoke.

The government next argues that the FCC's ruling "does not subject state and local officials to obligations going beyond those imposed by the 1996 Act itself." U.S. Br. 40 n.10. But Section 332(c)(7)'s express exclusionary language is not limited to additional "obligations." In broad terms, it forbids the FCC from invoking other provisions of the Act that would "affect" state and local decisionmaking. Unquestionably, the ruling in this case does so, and thereby "affects" local governments' ability to decide wireless siting applications in a manner and on a schedule that reflect local conditions. That was the very point.

Section 332(c)(7) thus provides that state and local governments must act on applications "within a *reasonable* period of time." 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). As discussed, courts interpreted the phrase "reasonable" to give state and local governments the flexibility to account for local circumstances. By contrast, the FCC reads

the same term to give *the agency* the flexibility to impose a uniform national zoning standard that conforms to its overall policy goals under the Communications Act. Never before was a state following its own law presumed to have violated federal law. Several states – and municipalities within those states – now are. Pet. App. 118a (¶ 48); Pet. 9. Never before was a local government presumed to have acted unreasonably when it followed its own standard zoning public hearing procedures. Now some are. Pet. App. 115a (¶ 44) (noting that new timelines "accommodate reasonable processes *in most instances*") (emphasis added). The agency recognized that the risks created by new federal requirements would in some instances force local governments to approve applications that they otherwise would not. Pet. 188a. There is accordingly no serious argument that the FCC's assertion of authority does not "affect" state and local decisionmaking.

For essentially the same reason, the government has matters backwards in asserting that the FCC has interpretive jurisdiction unless Congress expressly revokes it. The FCC's ruling represents a substantial intrusion on a sphere of classically state and local regulation, *see, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), and communities across the country enact these powers through local political processes. This case accordingly directly implicates the presumption that statutes do not change the balance of federal and state authority. *See New York v. United States*, 505 U.S. 144, 166 (1992) ("the Framers explicitly chose a Constitution that confers upon Congress the power

to regulate individuals, not States"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (citations omitted)).

Accordingly, the better reading is that Congress concluded that its decision in Section 332(c)(7) to protect local interests would be better effectuated if the statute were interpreted by the neutral judiciary – which is attentive to concerns of federalism – rather than interpreted by the FCC as a means to effectuate national telecommunications policy. Indeed, at the time Congress enacted the statute, the FCC had itself just expressed the view that zoning matters are "within the province of, and best resolved by, local land use authorities." *In re Artichoke Broad. Co.*, 10 FCC Rcd. 12,631, 12,633 (1995).

The government's remaining argument is that its position is supported by the House Report on the legislation. U.S. Br. 2-3 (H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 94 (1995)). But that Report addresses the House legislation – *rejected* in conference – calling for a rulemaking to establish policy on wireless siting decisions; it does not address Section 332(c)(7) as enacted. By contrast, the Conference Report on the *enacted* legislation – which the government does not cite – does not include the language cited by the government, including regarding a desire for "uniform, consistent" requirements. H.R. Rep. No. 204 at 94-95.

To the contrary, the Conference Report directs the Commission to *terminate* any rulemaking related to wireless citing, and explains that the statute imposes "limitations on the role and powers of the Commission . . . relate[d] to land use regulations." Pet. App. 209a, 211a. *See* Pet. Br. 32-33. It explains that local governments have "flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements." Pet. App. 209a. It adds that "[i]t is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." *Id.* 210a. And it specifies that "the courts shall have exclusive jurisdiction over all . . . disputes arising under this section." *Id.* 209a.

In sum, Section 332(c)(7) illustrates that an agency's interpretive jurisdiction is properly determined *de novo*.

CONCLUSION

The Court should reverse the judgment, or vacate that judgment and remand the case.

Respectfully submitted,

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[2] Petitioners acknowledge as well the financial assistance provided by the Cities of Austin, Texas and Yuma, Arizona, as well as the Michigan Municipal League Defense Fund Board.

REPLY BRIEF

NOS. 11-1545 & 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents;

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR RESPONDENTS INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; NATIONAL LEAGUE OF CITIES; UNITED STATES CONFERENCE OF MAYORS; NATIONAL ASSOCIATION OF COUNTIES; CITY OF CARLSBAD, CALIFORNIA; AND CITY OF DUBUQUE, IOWA IN SUPPORT OF PETITIONERS

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REPLY BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONERS

Both the horizontal separation of federal powers and the vertical protections of federalism prohibit *Chevron* deference in this case. Only Congress can authorize agency action, and the courts must adequately police the bounds of that authority. Deference to an agency that possesses regulatory authority is a straightforward application of *Chevron*. Deference to an agency on the threshold question of whether it possesses the very regulatory authority that would justify deference is simply an abdication unjustified by the theory of *Chevron* and at odds with bedrock principles of the separation of powers. Basic principles of federalism point in the same direction. Here, the federal agency not only seeks to enlarge its jurisdiction based on statutory ambiguity, but to do so at the expense of state and local authorities. Courts applying ordinary principles of statutory construction would demand a clear statement before recognizing such an intrusion into areas of traditional state and local control. An ambiguous grant of authority to an agency is no substitute for a clear statement.

The Federal Respondents' response to all this is to point to a handful of cases in which this Court has applied deference to questions that arguably implicate an agency's jurisdiction or state and local authority. But such "drive-by" rulings that did not directly consider the issue are no match for later cases of this Court that expressly declined to defer when agency aggrandizement or federalism considerations were at play. The Federal

Respondents' remaining contention is that the line between jurisdictional and non-jurisdictional questions is too difficult to police. But this Court has rejected such arguments before. Nothing would be easier to administer than a bright-line rule that says agencies are always entitled to deference. But in a variety of contexts this Court has established threshold tests that courts must apply before deferring to an agency. And none of those other rules—all of which present some difficult questions at the boundary—is more conceptually important than the principle that an agency is entitled to deference only on matters within its regulatory authority. In the end, there is simply no substitute for the courts determining that threshold question for themselves as a matter of plain old, non-deferential statutory construction.

ARGUMENT

I. Agencies' Jurisdictional Assertions are Not Entitled to *Chevron* Deference.

A. Granting Deference on Jurisdictional Questions Would Make Nonsense of the *Chevron* Doctrine.

1. Courts must determine the scope of an agency's jurisdiction *before* applying *Chevron* deference. As a doctrinal matter, this conclusion flows directly from the *Chevron* framework itself. The entire justification for an agency receiving deference is the necessary premise that "Congress delegated authority to the agency generally to make rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In the

absence of that premise—which must be established by ordinary principles of judicial review—there is no justification for giving special deference, beyond *Skidmore* deference, to an agency's construction of a statute. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (explaining that courts will "defer to the 'executive department's construction of a statutory scheme it is *entrusted to administer*'" (emphasis added) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

It is thus nothing short of incoherent to suggest that *Chevron* principles support giving deference to the agency in establishing the essential precondition for *Chevron* deference. *Chevron* deference is premised on the idea that an agency's views on ambiguous statutory language should be granted special solicitude *because* Congress has granted the agency authority to regulate the relevant subject matter. That rationale does not hold if an agency does not have jurisdiction over the subject matter it seeks to regulate. Thus, before granting deference, it is necessary for courts first to ascertain whether the agency has jurisdiction—*i.e.*, whether *Chevron* should apply at all. It cannot be that courts defer to the agency because a matter is within the agency's discretion, and that matter is within the agency's discretion because the courts defer, and so on and so forth. Any contrary rule would untether the *Chevron* doctrine from its conceptual basis and would stand on no firmer analytical foundation than "'turtles all

the way down.'" *Rapanos v. United States*, 547 U.S. 715, 754 (2006) (plurality opinion).

Indeed, in the most recent case to squarely confront the question, the Court refused to defer to an agency's view of its own statutory jurisdiction. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), this Court addressed the Attorney General's assertion of jurisdiction, under the Controlled Substances Act, to "prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure." *Id.* at 249. "*Chevron* deference," this Court emphasized, "is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." *Id.* at 258. As with the FCC here, the Attorney General possessed at least some regulatory authority under the statute; the question was whether he possessed jurisdiction over the specific matter he sought to regulate. *See id.* at 258–59.[1]

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[1] Though *Gonzales* suggested in passing that the FCC's regulatory authority will often be "'clear,'" because the agency has "'broad power to enforce all provisions of the statute,'" *see also* Br. for Fed. Resps. at 35, that brief reference to the Communications Act in the midst of an opinion about the Controlled Substances Act did not purport to be an exhaustive consideration of the subject, as this dispute demonstrates. Indeed, the very question here is whether the FCC has regulatory jurisdiction under specific statutory provisions found in section 332(c)(7) of the Telecommunications Act of 1996—which expressly preserve local zoning authority over wireless siting applications, channel disputes to the courts, and conspicuously *do not* grant the FCC any express, competing

This Court addressed that question *de novo*. It set out to ascertain the Attorney General's regulatory authority under the Controlled Substances Act just as it would analyze any other matter of statutory construction, by looking to the text, structure, and history of the Act. *Id.* at 258–68. Following that classic exercise, the Court concluded that the Attorney General did not possess the claimed regulatory power—without according the Attorney General's jurisdictional assertion any special consideration under *Chevron*. *See Id.* at 268. And the *de novo* analysis in *Gonzales* parallels the Court's reasoning in *Mead*. There, as in *Gonzales*, this Court employed the traditional tools of statutory construction, without deferring to the agency's interpretation, to determine whether "Congress would expect the [Customs Service] to be able to speak with the force of law" on tariff classifications. 533 U.S. at 229. Again as in *Gonzales*, this Court answered that question in the negative as a matter of ordinary statutory construction.

Federal Respondents have no real answer concerning either the conceptual foundation for *Chevron* deference or these on-point precedents. Indeed, their position here is no different from their position in *Gonzales*—that *Chevron* deference is required anytime an agency has interpreted an ambiguous statute. *Compare* Br. for Pet'rs at 21,

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authority over the subject matter. Moreover, *Gonzales*'s passing reference to the FCC's general authority does not suggest the FCC is always entitled to deference on questions of its own jurisdiction, but instead that the agency's jurisdiction will often be clear.

Gonzales, 546 U.S. 243 (No. 04-623), 2005 WL 1126079, *with* Br. for Fed. Resps. at 15, 20. This Court soundly rejected that argument in *Gonzales*, *see* 546 U.S. at 258, and it should do the same here.

The cases Federal Respondents cite to resist this inevitable conclusion all predate *Gonzales* and apply *Chevron* either in *dicta* or without squarely addressing whether deference is appropriate. In both *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 333, 341 (2002), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), the Court held that the statutes at issue were unambiguous and thus the question of deference was not essential to those decisions. In *Reiter v. Cooper*, 507 U.S. 258, 269 (1993), and *CFTC v. Schor*, 478 U.S. 833, 844 (1986), the Court granted deference without any discussion of whether doing so is appropriate for jurisdictional questions. Such "drive-by" exercises of deference have no precedential force, especially when the Court has squarely addressed the issue and resolved it to the contrary in later cases like *Mead* and *Gonzales*. *Cf. Hagans v. Lavine*, 415 U.S. 528, 534 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."). And Federal Respondents' remaining citations are a concurring opinion, a dissenting opinion, and a treatise—which even taken together are hardly "settled law." Br. for Fed. Resps. at 18.

As the foregoing demonstrates, this is not an effort "to carve out exceptions to *Chevron*'s

applicability." Br. for Fed. Resps. at 20 (internal quotation marks omitted). Rather, it is an effort to limit the *Chevron* doctrine to those contexts in which the foundational premise for the doctrine is satisfied. That is neither a retrenchment nor even a refinement of the doctrine; it is a straightforward application of it. The basic doctrinal logic of *Chevron* simply does not afford agencies deference on jurisdictional matters.

2. Nor do the subsidiary rationales underlying the *Chevron* doctrine support deference on jurisdictional questions. Federal Respondents suggest (at 21) that agencies' ability to "collect and evaluate the facts" make them better equipped than courts to define the bounds of their regulatory power. But questions of statutory jurisdiction are legal matters that require no technical expertise or the balancing of policy considerations. Adversary representation of those competing theories of statutory construction should more than suffice.

Moreover, to the extent that an agency's expertise would bear on a jurisdictional question, courts will not ignore that expertise. When *Chevron* deference does not apply, *Skidmore* deference does. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Mead*, 533 U.S. at 234–35. Courts will therefore grant an agency's interpretation of its own jurisdiction "a respect proportional to its 'power to persuade.'" *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). This includes the agency interpretation's "thoroughness, logic, and *expertness*, its fit with prior interpretations, and any other sources of weight." *Id.* (emphasis added). Thus,

while an agency's relative expertise will properly inform a court's interpretation of the agency's statutory jurisdiction, an *unpersuasive* agency interpretation of the scope of its own statutory jurisdiction will not *bind* the court.

Federal Respondents' argument (at 21) that "an agency can announce an interpretation with nationwide effect" may be true, but it is irrelevant. So can this Court, and although lower federal courts' statutory decisions do not have nationwide effect (despite the occasional effort to enter a nationwide injunction), that is by design. On ordinary issues of statutory construction it is a virtue not a vice that multiple courts of appeals can consider the question and this Court can intervene when there is a split of authority. Moreover, the government's identification of nationwide uniformity begs the question. An agency's ability to resolve a statutory ambiguity nationwide is desirable only to the extent the question is within the agency's authority to resolve. If not, the imposition of a nationwide rule in one fell *ultra vires* swoop is that much worse than *ultra vires* action of more modest impact.

B. Granting Deference on Jurisdictional Questions Would Violate the Separation of Powers.

Constitutional first principles also foreclose affording *Chevron* deference to an agency interpreting the scope of its own jurisdiction. It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

"An agency may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). This is because our Constitution vests all legislative power in Congress. *See* U.S. Const. art. I, § 1. Administrative agencies are limited to implementing congressionally-enacted legislation. *See* U.S. Const. art. II, § 3, cl. 5 (Take Care Clause). And the judiciary is uniquely tasked with interpreting the metes and bounds of Congress' enactments, *see* U.S. Const. art. III, § 1, even when an agency claims to act pursuant to its statutory authority, *see, e.g.*, *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *Gonzales*, 546 U.S. at 258–68. Allowing agencies to set the bounds of their own jurisdiction would flatly violate this horizontal separation of federal powers.

It makes no difference that agencies will on rare occasions disclaim authority. *See* Br. for Fed. Resps. at 26–27. Although a hammer may on occasion take a pass on something that bears some resemblance to a nail, that is not the natural tendency or a sound basis for constructing a rule of deference or a theory of the separation of powers. The natural tendency is for agencies to view even an arguable grant of statutory authority as a mandate for regulation—as the FCC does here, as the Customs Service did in *Mead*, and as the Attorney General did in *Gonzales*.

And *Chevron*'s first step does not eliminate this constitutional problem, *see* Br. for Fed. Resps. at 27, in cases like this where the agency demands deference beyond *Skidmore* at step two of the *Chevron* analysis. Under Federal Respondents' rule, when a statute contains ambiguity, but the better, more persuasive interpretation would limit agency

authority, courts must adopt the agency's less persuasive but more aggrandizing construction.

Likewise, it makes no difference that *Chevron* deference applies only when the agency's interpretation is within reason. *See* Br. for Fed. Resps. at 28. While "reasonably" unlawful action may be entitled to qualified immunity, it is still unlawful, and there is no reason to allow unlawful or *ultra vires* agency action to proceed on the theory that "close counts." That is particularly true on matters of jurisdiction. The judiciary, for its part, requires much more than a "reasonable" basis to assure itself of its own jurisdiction—because courts, like agencies, can confer no authority to themselves. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

These principles apply with equal force when an agency otherwise possesses broad regulatory authority. In such circumstances, Federal Respondents appear to propose (at 30–32) a presumption in favor of jurisdiction, absent a clear statement from Congress *removing* jurisdiction from the agency. That rule would reverse the proper separation of powers. Agencies start with no delegated power; they are entirely creatures of congressional enactment. But if Congress must *grant* an agency jurisdiction to act, it is not Congress' obligation to state with clarity when it has *not*

granted such authority. To be sure, when interpreting a jurisdictional statute *de novo*, a court might consider the context and structure of the law as part and parcel of the ordinary exercise of statutory interpretation. But that would not translate into a *presumption* that an agency with jurisdiction over many related subjects has jurisdiction over the subject matter in dispute, especially when the subject matter implicates concerns, like federalism, not shared by the related issues.

The separation-of-powers problems raised by the government's extraordinary claim to deference even as to the bounds of its deference-enabling authority are no mere abstraction. Enabling agencies unilaterally to expand their jurisdiction in this manner poses a grave threat to individual liberty. The separation of powers exists, of course, as a means to check government intrusion on personal freedom. *See Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.'" (quoting Montesquieu, *Spirit of the Laws*, bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent trans. 1949)). Agencies already enjoy substantial discretion when exercising delegated authority. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001). Allowing them to set the bounds of that authority would unconstitutionally compound that discretion into unchecked regulatory power. No doubt, this would only "encourage[] [an] agency to" interpret its jurisdiction broadly, "which [would] give it the power,

in future [rulemaking and] adjudications, to do what it pleases." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

C. Courts Can Distinguish Between Jurisdictional and Non-Jurisdictional Questions.

All that is left of Federal Respondents' argument is a fear that courts will be incapable of differentiating jurisdictional questions from run-of-the-mill questions of implementation. This is simply not so. As the American Farm Bureau *amici* amply demonstrate (at 26–37), drawing the line between jurisdictional and non-jurisdictional questions in the agency context is no more difficult than in the vast number of other circumstances where courts must draw such lines, and the need for drawing such lines is, if anything, greater. The potential for difficult decisions hardly warrants a rule granting agencies the power to expand their jurisdiction beyond statutory authorization.

The question of an agency's jurisdiction is at bottom one of statutory power: Has Congress granted the agency authority to regulate a certain person, place, or subject matter. Non-jurisdictional questions concern the implementation of that regulatory power once it has been confirmed to exist. The former concerns whether the agency may act at all; the latter concerns *how* the agency acts when it has the power to do so.

This case clearly illustrates the distinction. Both the FCC and the Court of Appeals understood that their analysis must proceed in two steps: (1) Does

the FCC have jurisdiction over state and local zoning procedures concerning wireless siting applications? If so, (2) Has the FCC adopted a permissible interpretation of the limitations set forth in section 332(c)(7) of the Telecommunications Act? (This second step, of course, would break down further to the two steps of the *Chevron* analysis.) Despite the Federal Respondents' protestation that the line is murky and artificial, neither the agency nor the court below had any trouble drawing this distinction and breaking their analysis into the antecedent jurisdictional question and the subsequent question of implementing section 332(c)(7)'s statutory terms.

Gonzales is similarly instructive. There, as here, it was clear that the necessary first question was whether statutory jurisdiction existed over the subject matter being regulated. Because this Court recognized that this jurisdictional question necessarily precedes any *Chevron* deference on the substance of the Attorney General's actions, it addressed the matter *de novo*. The same should occur here.

Federal Respondents' attempt to avoid this conclusion, again, relies largely on cases predating *Gonzales*. *See* Br. for Fed. Resps. at 24–25 (citing *Gulf Power Co.*, 534 U.S. 327; *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449 (1999); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)). All of the cases cited by Federal Respondents applied deference either in *dicta*, *see Gulf Power*, 534 U.S. at 333 ("This is our own, best reading of the statute, which we find unambiguous.");

Your Home Visiting Nurse Servs., 525 U.S. at 453 ("The Secretary's reading ... frankly seems to us the more natural—but it is in any event well within the bounds of reasonable interpretation ...."), or in drive-by rulings that did not confront the distinction between jurisdictional and non-jurisdictional questions, *see Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011); *Gulf Power*, 534 U.S. at 341–42; *Riverside Bayview Homes*, 474 U.S. at 131; *Your Home Visiting Nurse Servs.*, 525 U.S. at 453; *Holly Farms*, 517 U.S. at 398–99. Indeed, the Federal Respondents' reliance on *Riverside Bayview Homes* is triply problematic. Not only does that decision not focus on the jurisdiction/non-jurisdictional distinction and predate *Gonzales*, it also predates this Court's related decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), which did *not* defer to jurisdictional assertions in nearly identical circumstances, *see infra*.[2]

Finally, the line between jurisdictional and non-jurisdictional questions is no more difficult to enforce than other tests for determining *Chevron*'s

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[2] Even if Federal Respondents' citations were valid, at most they would demonstrate that this Court has, at times, gone in different directions on whether *Chevron* applies to jurisdictional questions, which is presumably why the Court granted *certiorari*. Setting aside precedential quibbles, it is clear that the logic of *Chevron*, the separation of powers, and this Court's federalism jurisprudence prohibit deference on jurisdictional questions.

applicability, and yet this line is far more vital. *Mead* already requires courts to determine if "Congress delegated authority to the agency generally to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–27. To the extent this inquiry differs from the jurisdictional/non-jurisdictional inquiry, it is no easier to administer. Likewise, before affording *Chevron* deference, courts must determine whether a statute confers authority on multiple agencies, *see, e.g.*, *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (citing *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986)), and whether certain forms of agency policymaking possess the "force of law," *see, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). And before deferring to an agency's interpretation of its own ambiguous regulation, courts must determine whether that interpretation "'reflect[s] the agency's fair and considered judgment.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). Those inquiries can prove difficult in borderline cases, but such difficulties have hardly proven insuperable. The jurisdictional line is no different.

II. *Chevron* Deference Is Especially Inappropriate When an Agency's Jurisdictional Assertion Affects Traditional State and Local Authority.

Principles of federalism preclude *Chevron* deference here as well. For at least as long as it has applied the *Chevron* doctrine, this Court has required

a clear statement before a federal statute will be construed to interfere with traditional state functions, *see Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), or upset the balance between the national authority and state and local governments, *see Jones v. United States*, 529 U.S. 848, 858 (2000); *United States v. Bass*, 404 U.S. 336, 349 (1971). The application of that clear statement rule here is not an "exception" or "carve-out" to the *Chevron* doctrine. It is a separate constitutional rule of equal application that reinforces the correct result here. An unclear delegation of authority to a federal agency is hardly a clear congressional statement that the federal-state balance is to be altered. When an agency attempts to expand its jurisdiction at the expense of state and local governments, principles of both separation of powers and federalism demand that courts resolve the question as an ordinary exercise in statutory construction. And, as in any other exercise of statutory construction, well-settled principles demand something more than ambiguity to upset the traditional federal-state balance.

Like the separation of powers, "[f]ederalism secures the freedom of the individual." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *see also Printz v. United States*, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); *The Federalist* No. 51. This Court's clear statement rule presumes that "Congress does not readily interfere" with state and local authority and thus guarantees that "the States retain substantial sovereign powers under our constitutional scheme." *Gregory*, 501 U.S.

at 461. It recognizes that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

The FCC's assertion of jurisdiction here clearly threatens to trench on state and local zoning procedures. The FCC's rule imposes universal, rigid limits on those procedures. It makes no difference that section 332(c)(7) already set forth *some* clear limitations. The question is whether Congress clearly authorized the FCC to go further, and the answer is no. The Federal Respondents essentially concede as much with the suggestion (at 38) that the FCC acted only to "clarify" an already preemptive statutory provision. Ambiguous statutes require clarification; clear statements do not.

This is precisely how this Court has reconciled the clear statement rule and the *Chevron* doctrine in the past when it has addressed the issue expressly. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, this Court rejected the government's plea for deference to the Army Corps of Engineers' assertion of jurisdiction over intrastate waters that serve as habitats for migratory birds, because there was no "clear indication that Congress intended that result." 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *see also Rapanos*, 547 U.S. at 738

("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

Federal Respondents do not mention these cases, nor explain why their reasoning does not apply. Instead, they cite *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), which is unavailing for multiple reasons. First, *Smiley* squarely held that *Chevron* deference "extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws," *id.* at 739, and never viewed the matter as a jurisdictional question. It is, at best, another drive-by ruling predating Supreme Court decisions directly on-point. Equally important, *Smiley* did not address a disruption of state or local power and thus did not involve the clear statement rule. Rather, it concerned the Comptroller of the Currency's interpretation of a federal banking law that preempted a contrary state law. Here, by contrast, the FCC seeks to impose deadlines on state and local government procedures—which strikes to the heart of the federal balance of power—and thus the clear statement rule applies.

The no-deference rule thus reconciles the clear statement rule with the plain logic of *Chevron*. When the clear statement rule is satisfied through unmistakable statutory language, no resort to *Chevron* is even necessary. And when a statute is silent or ambiguous on regulatory jurisdiction over

state or local functions, a precondition for *Chevron* deference, then the requisite clear statement is missing. This doctrinal syllogism is consistent with the logic of our Constitution's horizontal and vertical separations of power. An act of Congress that "'significantly change[s] the federal-state balance,'" *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349), is a remarkable event that requires unambiguous action by both houses of the legislature and approval by the President. Regulatory actions that disrupt the federal structure must clearly derive from such legislative authorizations. The courts must ensure this is so as a core exercise of judicial review, and not as an exercise in deference to even unpersuasive agency intrusions into areas of traditional state and local concern.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND

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Nos. 11-1545 and 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL., PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF HOME BUILDERS, NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL MINING ASSOCIATION, AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The American Farm Bureau Federation ("Farm Bureau") was formed in 1919 and is the largest non-profit general farm organization in the United States. Representing more than 6.2 million member facilities in all 50 States and Puerto Rico, the Farm Bureau maintains a membership that produces every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers. To that end, the Farm Bureau has regularly participated as amicus curiae in this Court in cases involving the proper scope of federal regulation and jurisdictional limits on the authority of federal administrative agencies. Among other things, the Farm Bureau participated as *amicus curiae* in *Rapanos* v. *United States*, 547 U.S. 715 (2006), successfully urging the Court to enforce the Clean Water Act's statutory limits on federal jurisdiction to regulate wetlands.

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the proper scope of federal regulation.

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 130,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C.,

and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files amicus briefs in cases that will affect small businesses.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The member entities whose interests RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts

with retail industry perspectives on significant legal issues and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases.

Amici have a substantial interest in this case because their members are subject to the jurisdiction of federal administrative agencies in a wide range of substantive areas. Collectively, *amici* represent hundreds of thousands of U.S. businesses that have extensive experience with agency efforts to expand their jurisdiction beyond the authority delegated to them by Congress. Independent judicial review has long served as a critical bulwark for *amici*'s members against the unchecked expansion of federal regulation. Granting deference to administrative agencies' interpretations of the statutes that define their jurisdiction would, in the view of *amici* and their members, remove an essential guarantee of limited government and democratic accountability.

SUMMARY OF ARGUMENT

At the heart of this case is the question whether federal courts must defer, under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to administrative agencies' interpretation of their own jurisdiction. Expanding the scope of "*Chevron*'s domain" to agency jurisdictional determinations would have vast—and troubling—implications for the administrative state.

Petitioners, respondents supporting petitioners, and their other *amici* set forth compelling doctrinal arguments why courts should not defer to agency interpretations of their own jurisdiction. This brief

complements those arguments by demonstrating the wide range of circumstances in which jurisdictional questions have arisen, and the extraordinary legal and economic significance of the issues presented. Historically, *de novo* judicial review of agency assertions of jurisdiction has served as an essential check against agency aggrandizement of power. That safeguard not only protects regulated entities, but also helps preserve the proper allocation of authority within the federal government and the relationship between the federal government and the States. Regardless whether an agency assertion of jurisdiction is warranted in a given case, jurisdictional questions are sufficiently important to require courts to make their own independent determination.

The main objection jurists have voiced about a no-deference rule is a practical concern that courts will have difficulty distinguishing jurisdictional from non-jurisdictional questions. But the possibility of close cases does not justify expanding *Chevron* deference, especially where, as here, the issue unquestionably involves the scope of agency jurisdiction. As the court of appeals correctly recognized, this case presents the threshold question of whether Congress delegated authority to the Federal Communications Commission ("FCC") to interpret the statutory provision at issue—wholly apart from the question whether the FCC's interpretation of that provision was a permissible one. No deference is due on that threshold jurisdictional question.

Moreover, even as to the broader class of cases that involve whether the agency used its interpretive authority over a provision permissibly, line-drawing

concerns do not justify extending *Chevron*. Such concerns are no more substantial than in other areas where courts identify limits on jurisdiction. Courts can draw on traditional tools of statutory interpretation and, in close cases, familiar background principles. Line-drawing concerns can also be expected to diminish over time, because a no-deference rule will give Congress a beneficial incentive to legislate clearly in defining agency jurisdiction.

BACKGROUND

This case involves a dispute between local governments and the FCC about the agency's assertion of jurisdiction under Section 332(c)(7) of the Telecommunications Act, 47 U.S.C. § 332(c)(7), to regulate state and local land-use decisions about the placement of wireless communications facilities. Captioned "[p]reservation of local zoning authority," Section 332(c)(7) begins with a blanket reservation of authority: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(A). Subparagraph (B) then lists exceptions to the rule, requiring state and local governments to (among other things): "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time"; and not regulate "on the basis of the environmental effects of radio frequency emissions" to the extent such facilities comply with FCC regulations. *Id.* § 332(c)(7)(B)(ii), (iv).

Section 332(c)(7)(B)(v) divides jurisdiction over violations of subparagraphs (i)–(iv) between the FCC and courts. Challenges to a state or local "final action or failure to act" that is "inconsistent with * * * subparagraph [(B)]" may be brought in a "court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v). But persons aggrieved under the "radio frequency emission" restriction in subparagraph (iv) "may petition the [FCC] for relief." *Id.*

ARGUMENT

As petitioners, respondents supporting petitioners, and their other *amici* explain, there are compelling reasons why courts should not defer to agency decisions about their own jurisdiction. A no-deference rule follows from the core principle that an agency "literally has no power to act * * * unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986); accord *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Also, because expanding federal jurisdiction often intrudes into areas of traditional state authority, recognizing agency authority based on absent or ambiguous statutory language violates the rule that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). Agencies have no comparative expertise or advantage in interpreting jurisdictional statutes. To the contrary, there is a risk that agency self-interest will cause them systemati-

cally to exaggerate the scope of their authority. This Court has never held that agency jurisdictional interpretations are entitled to deference, and a faithful reading of its cases supports the contrary rule.

There are two principal types of jurisdictional inquiries: first, whether Congress has delegated interpretive authority over a provision to an agency; and second, whether the agency has used its interpretive authority over a provision permissibly. This Court has reviewed *de novo* whether Congress delegated interpretative authority to an agency in the first instance. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 231–233 (2001). The court of appeals correctly identified that question but erred by affording *Chevron* deference to the FCC's view about whether Congress had intended it, and not a court, to define a "reasonable period of time" under Section 332(c)(7)(B)(ii). That jurisdictional question is analytically distinct from, and antecedent to, a range of other jurisdictional questions involving whether the agency's interpretation is permissible, such as whether the FCC's interpretation of a "reasonable period of time" to mean 90 or 150 days improperly infringed state authority.

The argument against deference is strengthened by understanding the variety of circumstances in which jurisdictional questions have arisen, and the tremendous legal and economic significance of the issues presented. *De novo* judicial review serves as an essential check against agency aggrandizement of power. That constraint not only protects the interests of regulated entities, but also prevents federal intrusion into areas of traditional state authority

and preserves the allocation of power within the federal government. Whether or not an agency's assertion of jurisdiction is ultimately appropriate in a given case, jurisdictional questions are sufficiently important to warrant independent determination by courts.

The main objection jurists have expressed about a no-deference rule is not theoretical or doctrinal, but rather the practical concern that courts will have difficulty distinguishing jurisdictional from non-jurisdictional questions. But the possibility of close cases does not justify expanding *Chevron*, especially where—as here—an issue unquestionably concerns agency jurisdiction, in the sense of a delegation of interpretive authority. Moreover, as to jurisdictional issues generally, line-drawing concerns are no more substantial than in other areas where courts identify jurisdictional questions. Courts can draw on traditional tools of statutory interpretation and, in close cases, several familiar background principles.

Moreover, denying *Chevron* deference would give Congress a salutary incentive to speak clearly about agency jurisdiction, "assur[ing] that the legislature has in fact faced, and intended to bring into issue," *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted), the implications of extending agency regulatory authority to an area. Such a course would be consistent with the "common sense" understanding that Congress is unlikely "to delegate a policy decision of [great] economic and political magnitude to an administrative agency" without saying so clearly. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). If *Chevron*

were applicable, Congress foreseeably would favor vague jurisdictional statutes in the expectation of using political pressure or oversight authority to affect later agency decisionmaking. See Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1545–1546 (2009). Congress lacks similar mechanisms to influence courts, increasing the risk and cost to Congress of enacting vague statutes. Leaving jurisdictional determinations to the independent judgment of courts would thus provide Congress an incentive to answer clearly the most basic of administrative-law questions: whether it has delegated authority to an agency to act in a particular area.

I. *De Novo* Judicial Review Of Jurisdictional Questions Is A Critical Safeguard Against Agency Aggrandizement

The examples discussed below illustrate that agencies have frequently sought to expand their jurisdiction across a broad range of substantive areas, and that jurisdictional questions often have extraordinary practical, economic, and legal significance that underscores the need for *de novo* judicial review. By applying a less-searching standard of review, *Chevron* deference would inevitably uphold agency assertions of jurisdiction that lack a proper statutory basis.

1. Jurisdiction to regulate the "waters of the United States"

The longstanding—and ongoing—efforts by the U.S. Army Corps of Engineers ("Corps") and the U.S.

Environmental Protection Agency ("EPA") to expand their Clean Water Act jurisdiction to cover vast swaths of land illustrates the consequences of agency efforts to expand the sweep of their authority. Non-deferential review by this Court has served as a critical check on an unprecedented expansion of federal jurisdiction.

The Clean Water Act authorizes EPA and the Corps to regulate the discharge of pollutants into "navigable waters," defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1251, 1344, 1362(7). In 1977 and 1980, the Corps and EPA promulgated regulations defining "the waters of the United States" to include navigable and tidal waters, tributaries, certain wetlands, impoundments, and other waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3). The agencies interpreted this definition as coextensive with the reach of the Commerce Clause, 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977), but initially acknowledged that many waters fell outside the scope of that jurisdiction.[2]

The intervening decades, however, saw an "immense expansion of federal regulation of land use * * * under the Clean Water Act—without any change in the governing statute." *Rapanos* v. *United*

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[2] See 45 Fed. Reg. 33,290, 33,398 (May 19, 1980) (preamble) ("[S]mall, isolated wet areas may not be waters of the United States * * * because * * * their destruction or degradation would not have any effect on interstate commerce.").

States, 547 U.S. 715, 722 (2006) (plurality opinion). This Court has rejected efforts by the Corps and EPA to stretch their jurisdiction "beyond parody," *id.* at 734 (plurality opinion), seeking to regulate ever-expanding tracts of land with increasingly tenuous connections to "navigable waters."

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court rejected the Corps' assertion of jurisdiction to regulate an abandoned sand and gravel pit based on the presence of isolated "seasonal ponds" used by migratory birds. The Court noted that the Corps had originally taken a much narrower view of its jurisdiction. Deference to the agency's claim of jurisdiction was inappropriate, the Court explained, because the agencies' interpretation "invoke[d] the outer limits of Congress' power" and "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power," without a "clear indication that Congress intended that result." *Id.* at 172–174. Accordingly, the Court held that "nonnavigable, isolated, intrastate waters" that do not "actually abu[t] on a navigable waterway" fall outside the agencies' jurisdiction. *Id.* at 167, 172.

Unchastened by that defeat, the agencies devised a different but equally expansive theory of jurisdiction. Seeking to distinguish *SWANCC* as involving only "isolated" waters, the Corps asserted jurisdiction to regulate waters having *any connection* to navigable waters. In particular, the agencies asserted jurisdiction over "tributaries"—defined expansively to include farm and flood control ditches, drain tiles,

storm drain systems, pipes, rainfall runoff, and desert washes—that connected otherwise non-jurisdictional areas to navigable waters. Regulation of the tributaries was, in turn, the basis for asserting jurisdiction over upland areas, on the theory that water there was connected to navigable waters through the hydrological cycle.

Rapanos emphatically rejected the agencies' "'Land is Waters' approach to federal jurisdiction." 547 U.S. at 734 (plurality opinion). The plurality observed that over the preceding 30 years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States," as well as "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722. That regulatory expansion had imposed tremendous costs on those who found themselves in the path of the agencies' expansion: The plurality noted that the average permit applicant spends "788 days and $271,596 in completing the process," more than $1.7 billion each year is spent nationwide obtaining wetlands permits, and violations carry the threat of criminal liability and civil fines. *Id.* at 721.

In the plurality's view, the agencies' assertion of jurisdiction could not be reconciled with the plain meaning of the statute. Even if the statutory text *were* ambiguous, the agencies' interpretation would be impermissible: The Corps "function[ing] as a *de facto* regulator of immense stretches of intrastate

land" would constitute an "unprecedented intrusion into traditional state authority" and would "stretc[h] the outer limits of Congress's commerce power." *Id.* at 738. Justice Kennedy likewise criticized the Corps' interpretation for "leav[ing] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water," *id.* at 781 (Kennedy, J., concurring in judgment), and concluded that waters fall within federal jurisdiction only if they have a "significant nexus" to waters that are navigable in fact or could reasonably be so made. *Id.* at 782. Not all of the Justices agreed that the statute was clear on its face; the dissenters would have granted *Chevron* deference to the Corps' jurisdictional interpretation. *Id.* at 788 (Stevens, J., dissenting).[3]

Despite these defeats, the agencies appear undeterred in their efforts to expand their regulatory jurisdiction "without any change in the governing statute." *Rapanos*, 547 U.S. at 722 (plurality opin-

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[3] Given the sharp disagreement about whether the statutory text was unambiguous, the case may reflect the reality that uncertainty about deference to jurisdictional questions has led some courts to guard against aggrandizement "primarily by exercising especially vigorous statutory interpretation at *Chevron*'s step one when agencies press the limits of their authority, not by creating an exception to *Chevron* deference." Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 911 (2001); *Smiley* v. *Citibank (S.D.)*, 517 U.S. 735, 739 (1996) (finding it "difficult indeed to contend that * * * [the statute] [wa]s unambiguous with regard to the point at issue here" given dissents in the court below and a split of authority in the lower courts).

ion). Efforts to amend the CWA to expand its reach beyond "navigable" waters failed in Congress. See, *e.g.*, America's Commitment to Clean Water Act, H.R. 5088, 111th Cong. §§ 4, 5 (2010); Clean Water Restoration Act, S.787, 111th Cong. §§ 4, 5 (2009). In April 2011, EPA and the Corps released draft "guidance" to "clarify" how they will identify jurisdictional "waters of the United States," with the stated intent to "increase" the "extent of waters over which the agencies assert jurisdiction."[4] *Draft Guidance* 3. The draft guidance asserts jurisdiction over, among other things, "[t]ributaries to traditional navigable waters" and "[w]etlands adjacent to [such] jurisdictional tributaries." *Id.* at 5. The draft guidance treats wetlands as jurisdictional if they, "alone or *in combination with similarly situated lands* in the region," have a significant nexus to traditional navigable waters. *Id.* at 23 (emphasis added). This "aggregation" theory will have significant practical consequences, allowing the agencies to assert jurisdiction over lands that themselves lack a significant nexus to navigable waters merely because they purportedly have the necessary relationship when combined with all other "similarly situated lands in the region."

The ever-expanding assertion of federal authority over lands in the guise of regulating "navigable waters" is perhaps the most stark illustration of the dangers of giving decisive weight to agencies' views

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[4] See U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (Apr. 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

about the scope of their own jurisdiction—and in particular, of the high federalism costs that such a course would entail as federal agencies "imping[e] o[n] the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. But fundamentally, it is only a single example of a widespread phenomenon—that where agencies *can* construe ambiguity to expand their jurisdiction, they *will* do so.

2. The "ancillary jurisdiction" of the Federal Communications Commission

This Court and lower courts have also closely scrutinized expansions of the FCC's "ancillary jurisdiction." Title I of the Telecommunications Act of 1934 grants the FCC jurisdiction to regulate "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a). This Court has recognized that the Commission may exercise jurisdiction either pursuant to express statutory authority, or pursuant to its "ancillary jurisdiction." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999); *United States* v. *Sw. Cable Co.*, 392 U.S. 157, 167 (1968). To regulate under ancillary jurisdiction, two conditions must be met: (1) the "subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I," *Am. Library Ass'n* v. *FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) ("*ALA*"); and (2) the subject of regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Sw. Cable*, 392 U.S. at 178.

Courts have carefully policed the boundaries of the FCC's ancillary jurisdiction, ensuring that this

"somewhat amorphous" doctrine is appropriately "constrained." See *ALA*, 406 F.3d at 692. In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 691 (1979), this Court rejected a Commission rule that required cable television systems carrying broadcast signals and having 3,500 or more subscribers to develop a 20-channel capacity, make channels available for third-party access, and furnish equipment for access purposes. Because the Act prohibits treating broadcasters as common carriers, this Court held the rule exceeded the Commission's ancillary jurisdiction because it sought to impose common-carrier obligations on cable television systems. While recognizing that the statutory bar on treating broadcasters as common carriers did not expressly extend to cable systems, the Court explained that it would apply the Act's provisions governing broadcasting, because otherwise "the Commission's jurisdiction under [Title I] would be unbounded." *Id.* at 706. The Court distinguished other circumstances in which a "lack of congressional guidance" might otherwise "le[a]d us to defer * * * to the Commission's judgment," *id.* at 708, concluding from the "strong [statutory] indications" (such as the prohibition on treating broadcasters as common carriers) that the Commission's authority "was to be sharply delimited." *Id.*

Lower courts have taken a similarly skeptical approach. *ALA*, for instance, addressed an FCC mandate that equipment manufacturers include digital broadcast copy protection features (a "broadcast flag") that would prevent digital television equipment from *redistributing* a completed broadcast. 406 F.3d at 691. The Commission's explicit jurisdictional

grant, however, extends only to "interstate and foreign communication by wire or radio" (47 U.S.C. § 152(a)) and "apparatus" that are "incidental to * * * transmission," *id.* § 153(40), (59). While recognizing that its assertion of jurisdiction departed from its historical practice (*Digital Broadcast Content Protection*, 18 F.C.C.R. 23,550, 23,566 (2003)), the FCC invoked its ancillary jurisdiction to regulate apparatus even when they were not receiving a broadcast transmission.

The court of appeals held that the FCC had exceeded its ancillary jurisdiction because there was "no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing." 406 F.3d at 692. This statutory text, the D.C. Circuit explained, did not give the FCC "general jurisdiction" over devices "that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission." 406 F.3d at 700. The court expressly rejected the FCC's "self-serving invocation of *Chevron* [deference]" on the ground that Congress had not delegated authority to regulate in the areas at issue. *Id.* at 699, 705. As a result, the court refused to construe ancillary jurisdiction "in a manner that imposes no meaningful limits on the scope of the FCC's general jurisdictional grant." *Id.* at 703. The court noted that in "seven decades of its existence, the FCC has never before asserted such sweeping authority," and indeed "in the past [had] * * * informed Congress that it lacked any such authority." *Id.* at 691.

3. *Office of Management and Budget jurisdiction to review and reject agency rulemaking under the Paperwork Reduction Act*

Agency aggrandizement of jurisdiction does not always involve an expansion of obligations for regulated entities. In *Dole* v. *United Steelworkers of America*, 494 U.S. 26 (1990), for example, the White House Office of Management and Budget ("OMB") asserted jurisdiction to review and remand a Department of Labor hazard communication regulation that would have required employers to inform employees about the hazards of chemicals used in the workplace. *Id.* at 28–30. OMB concluded certain aspects of the agency's rule were unnecessary to protect employees and remanded it for changes. *Id.* at 30–31. This Court rejected OMB's assertion of jurisdiction to review and remand the rule under the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, which authorizes review of rules that involve an agency's "information collection request[s]." 494 U.S. at 33 (citing 44 U.S.C. § 3507(a)(2)). In the Court's view, the statute only authorized OMB to review rules that require *collection* of information *by the government* (e.g., tax forms, Medicare forms, compliance reports, and tax records), and distinguished the hazard disclosure rules, which required *disclosure* of information *to a third party*. The Court expressly "decline[d] to defer to OMB's interpretation" of the statute. 494 U.S. at 42 & n.10.

In dissent, Justice White and Chief Justice Rehnquist criticized the majority for not deferring to OMB's interpretation under *Chevron*. 494 U.S. at 43–44 (White, J., dissenting). They pointedly ques-

tioned the majority's conclusion that the statute was unambiguous, noting that the majority opinion took "10 pages, including a review of numerous statutory provisions and legislative history" to support its view that the statute was facially clear. *Id.* at 43. See generally note 3, *supra*.

4. Federal Trade Commission jurisdiction to regulate lawyers as "financial institution[s]"

Although the federalism costs of agency aggrandizement have been particularly acute in the environmental context, see pp. 10-16, *supra*, regulatory expansion in other areas has infringed on matters historically regulated by States. In *American Bar Association* v. *FTC*, 430 F.3d 457, 465, 471 (2005) ("*ABA*"), the D.C. Circuit, recognizing that "regulation of the practice of law is traditionally the province of the states," rejected efforts by the Federal Trade Commission ("FTC") to regulate attorneys engaged in the practice of law as "financial institution[s]" under the Gramm-Leach-Bliley Financial Modernization Act. That Act authorizes the FTC to promulgate regulations "with respect to financial institutions * * * subject to [its] jurisdiction under section 6805," 15 U.S.C. §§ 6801(a), 6804(a)(1), to safeguard the privacy of their customers.

The FTC maintained that attorneys engaged in the practice of law were subject to the Act's requirements, emphasizing that nothing in the Act explicitly prohibited it from regulating attorneys. The D.C. Circuit sharply rejected that position, explaining that "if we were to presume a delegation of power from the absence of an express withholding of such

power, agencies would enjoy virtually limitless hegemony." 430 F.3d at 468 (internal quotation marks omitted). The court perceived no ambiguity sufficient to justify reaching *Chevron* step 2, finding no indication in the statute that Congress intended to regulate the profession of law. *Id.* at 469. In the alternative, the court concluded that the agency's interpretation was unreasonable under *Chevron* step 2, in part because regulation of the practice of law has been "the province of the states * * * throughout the history of the country." *Id.* at 471–472. The court refused to uphold a regulation that would so "alter the usual constitutional balance between the States and the Federal Government" absent a clear congressional statement that it intended do so. *Id.* (internal quotation marks omitted).

5. *Department of Transportation jurisdiction to authorize money damages as a remedy for violations of the Americans with Disabilities Act*

Agency attempts to expand jurisdiction can affect not only the federal-state balance, but also the division of authority between the branches of government. That principle is illustrated by the case at bar, in which the FCC has asserted jurisdiction to define a term ("a reasonable period of time") that will establish a rule of decision to a type of challenge that Congress has provided will be resolved in court. 47 U.S.C. § 332(c)(7)(B)(v). Compare Pet. App. 43a (FCC's interpretation would "guide courts' determinations of disputes under [Section 332(c)(7)(B)(ii)]"), with *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (affording no deference where "Congress has expressly established the Judiciary and not the

[agency] as the adjudicator of private rights of action arising under the statute").

American Bus Association v. Slater, 231 F.3d 1 (2000), provides another example. There, the D.C. Circuit held that the Department of Transportation ("DOT") lacked authority to promulgate a rule authorizing money damages against bus companies for violations of the Americans with Disabilities Act ("ADA"). The ADA authorizes DOT to promulgate rules about the accessibility of large inter-city buses. 42 U.S.C. § 12186. DOT promulgated a rule that not only set accessibility standards (*e.g.*, boarding assistance and wheelchair lifts), but required bus companies to pay monetary compensation to passengers for violations. 231 F.3d at 3. The D.C. Circuit held that Congress had clearly precluded DOT from authorizing a money damages scheme. The court relied in part on a statutory provision authorizing the Attorney General to bring a civil action for money damages—a provision that, in the court's view, made clear that money damages could only be "awarded by a court" through a civil action. *Id.* at 5. Judge Sentelle wrote separately, pointedly rejecting the agency's argument that "the absence of a statutory grant of power is itself an ambiguity that calls for *Chevron* deference." *Id.* at 8 (Sentelle, J., concurring). He emphasized that "a statutory silence on the granting of a power is a *denial* of that power to the agency," and thus "a statute that is completely silent on the question of whether it confers a power does not vest the agency with the discretion to determine the scope of that power." *Id.* at 8–9. In Judge Sentelle's view, it would have "ma[de] a mockery of *Chevron*" to

suggest that deferential step 2 review is implicated by Congress's "failure to deny a power to an agency." *Id.* at 9.

6. Department of Homeland Security authority to modify the jurisdiction and authority of the Federal Labor Relations Authority

Agency attempts to expand jurisdiction also have implications for the division of authority within the federal administrative state. *National Treasury Employees Union* v. *Chertoff*, 452 F.3d 839, 866 (D.C. Cir. 2006) ("*NTEU*"), for instance, involved regulations promulgated by the Department of Homeland Security ("DHS") and Office of Personnel Management establishing a human resources system for DHS. Among other things, the DHS regulations sought to channel certain labor disputes involving DHS employees to the Federal Labor Relations Authority ("FLRA"). The DHS regulations would have required the FLRA—an independent agency with statutory jurisdiction to adjudicate certain federal employee claims and labor disputes—to defer to findings of fact and interpretations of law made by the Homeland Security Labor Relations Board ("HSLRB"), and would have authorized the HSLRB to assume jurisdiction over any dispute if it determined that the matter affected homeland security.

The D.C. Circuit declined to defer to DHS's interpretation of its statutory authority. The court rejected the agency's theory that courts should "presume a delegation of power" simply because Congress had not explicitly "with[e]ld * * * such power" from the agency—a result the court explained would

give agencies "virtually limitless hegemony." 452 F.3d at 866 (internal quotation marks omitted). Further, the agency's interpretation of the statute "would allow [DHS] to overtake *any* agency to achieve its own ends." *Id.* The DHS regulations, the court observed, purported to impose a "novel procedural scheme" on the FLRA, "even though nothing in the [Act] authorizes DHS to regulate the work of the Authority or alter its statutory jurisdiction." *Id.* at 865. The rule sought to conscript FLRA into reviewing a group of cases DHS had selected, and to redefine the FLRA's statutory role. *Id.* at 865–866.

7. EPA authority to withdraw specification of discharge sites after the Army Corps has issued a Clean Water Act permit

The need for *de novo* judicial review of jurisdiction to preserve the division of authority among agencies is likewise apparent in the Clean Water Act context. Section 404 of the Act vests the Corps with authority to issue permits for discharges into navigable waters. 33 U.S.C. § 1344. Congress, however, granted EPA a limited veto authority, empowering EPA to "prohibit * * * [,], deny or restrict" the specification of a disposal site ("including the withdrawal of specification") "whenever" EPA determines discharge will have certain adverse environmental effects. *Id.* § 1344(c). In *Mingo Logan Coal Co.* v. *EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012), the court rejected EPA's asserted authority to withdraw a disposal-site specification *after* the Corps had issued a permit. EPA argued that its "withdrawal" had the legal effect of invalidating the discharge permit, even while conceding the statute vested authority to

grant and revoke permits in the Corps (which had declined EPA's request to revoke the permit). *Id.* at 142. The court refused to afford *Chevron* deference, in part because of the statute's "clear scheme of shared responsibility." *Id.* at 145–146. The court held the statute did not clearly grant EPA the authority to revoke a permit, and the agency's reading was in any event unreasonable, impinging on the Corps' permitting authority. *Id.* at 152–153.

8. Interstate Commerce Commission regulation of container transportation wholly inside a private terminal facility, based on statutory authority to regulate shipments "on a public highway"

The practical consequences of extending *Chevron* deference are clearest where courts have "deferred" to agency interpretations even while expressing doubts that the interpretation is permissible. Those cases illustrate that according deference is often outcome-determinative and can result in courts validating assertions of jurisdiction that are dubious at best. *P.R. Maritime Shipping Authority* v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988), for instance, involved the jurisdiction of the Interstate Commerce Commission ("ICC") to regulate "transportation by motor carrier * * * to the extent that passengers, property, or both, are transported by motor carrier * * * on a public highway." *Id.* at 551 (quoting 49 U.S.C. § 10521 (1982)). The agency maintained that transportation that occurred wholly within a privately controlled terminal facility was subject to a tariff that applied only to shipments under ICC jurisdiction. The shipper argued the tariff

did not apply because the shipments were not "on a public highway."

The court felt itself obliged to grant *Chevron* deference to the agency's interpretation and to uphold its decision to treat such shipments as being "on a public highway." 856 F.2d at 552. *Chevron* deference, the court believed, is "fully applicable to an agency's interpretation of its own jurisdiction." *Id.* The court noted its reservations about the curious result that a private facility was "a public highway," emphasizing that "one might reasonably prefer [the shipper's] reading of the 'on a public highway' requirement" to what it delicately termed "the Commission's less-than-literal interpretation." *Id.*

* * * * *

As the above examples illustrate, agencies have attempted to expand their jurisdiction in a wide range of contexts. Agency aggrandizement can raise federalism concerns by intruding on areas of traditional state competence and can distort the allocation of authority within the Executive Branch or between agencies and courts. Because jurisdictional questions often involve categorical assertions of authority to act in a particular sphere, they can have tremendous practical and financial significance that warrants subjecting them to non-deferential review.

II. Courts Can Draw Principled Distinctions Between Jurisdictional And Non-Jurisdictional Questions

Justice Scalia's concurring opinion in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487

U.S. 354, 377–81 (1988), articulates what some courts and commentators view as "the most compelling objection" to a no-deference rule for jurisdictional interpretations. See Sales & Adler, 2009 U. Ill. L. Rev. at 1555; see also *Ry. Labor Execs.' Ass'n* v. *Nat'l Mediation Bd.*, 29 F.3d 655, 676–677 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting). That opinion stated, "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring in judgment). This line-drawing concern rests not on an affirmative theoretical defense of *Chevron* deference. Rather, the claim is "prudentialist" and "hangs by [the] empirical thread" that it is "impossible (or prohibitively difficult) to identify a jurisdictional question as jurisdictional." Sales & Adler, 2009 U. Ill. L. Rev. at 1508.

There are, however, compelling reasons to believe that courts can draw principled and consistent distinctions between statutes that address an agency's jurisdiction and those that do not. The possibility of "hard cases" does not justify extending *Chevron* deference to circumstances—like here—that unquestionably involve limits an agency's jurisdiction. In closer cases, courts have recourse to traditional tools of statutory construction, and a body of case law drawing similar lines in the context of courts' subject-matter jurisdiction. Finally, courts can rely on several familiar norms to identify jurisdictional questions.

A. The Possibility Of Hard Cases Does Not Justify Extending *Chevron* Deference To Cases That Unquestionably Involve Limits On Agency Jurisdiction

The possibility of hard cases cannot justify extending *Chevron* deference to issues that unquestionably involve agency jurisdiction.

This case provides a compelling example. As the court of appeals correctly recognized, the threshold question is whether Congress delegated authority to the FCC to act *at all* to define the meaning of the phrase "a reasonable period of time" in Section 332(c)(7)(B)(ii). The statute provides clear textual indications that it addresses, and serves to limit, the FCC's authority to act. First, Section 332(c)(7)(A) effects a blanket reservation of "authority" to state and local governments to act in an area of traditional state authority—land use. 47 U.S.C. § 332(c)(7)(A). This reservation of rights constitutes an express restraint on federal jurisdiction in the area, and thus FCC's authority to act.[5] Section 332(c)(7)(B)(v) grants jurisdiction to *courts* to adjudicate alleged violations of subparagraph (ii) (the "reasonable period of time" requirement), leav-

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[5] The fact that the subject-matter (zoning decisions) is an area well outside the core content of the Communications Act also supports treating the question as jurisdictional. See Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999) ("The first criterion for determining whether *Chevron* deference should apply is whether the questioned jurisdiction is within the agency's core regulatory assignment.").

ing the FCC with jurisdiction over a different and narrower class of cases involving the effects of radio frequency emissions. *Id.* § 332(c)(7)(B)(v). Where, as here, the threshold question is whether Congress has delegated authority to the agency to act at all, courts need not draw the distinction, discussed in the *Mississippi Power* concurrence, between an agency's "authorized application of its authority" and the agency "exceeding its authority." 487 U.S. at 381 (Scalia, J., concurring in judgment).

The consequences of affording deference to assertions of jurisdiction are significant—indeed, deference is often dispositive. See p. 25, *supra*. So it was here: The court of appeals upheld the FCC's assertion of authority on the basis that the statute did not unambiguously *preclude* the FCC from implementing the provisions at issue, in essence applying a default rule in *favor* of jurisdiction. That approach is difficult to square with the "axiomatic" rule that agencies are "limited to the authority delegated by Congress." *Bowen*, 488 U.S. at 208. "[I]f [courts] were to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony." *ABA*, 430 F.3d at 468; accord *Am. Bus Ass'n*, 231 F.3d at 8 (Sentelle, J., concurring) ("as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency").

B. Courts Can Rely On Traditional Tools Of Statutory Interpretation In Identifying Jurisdictional Issues

Because "an agency literally has no power to act * * * unless and until Congress confers power upon it" through legislation, *La. Pub. Serv. Comm'n*, 476 U.S. at 374, the task of identifying jurisdictional questions is ultimately one of statutory construction. As in the above analysis of § 332(c)(7)(B), courts are guided in that effort by traditional tools of interpretation, under which "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

Courts use these tools to identify Congress's expressed intent about whether a statute involves an agency's jurisdiction—*e.g.*, the agency's "power to act" in a particular sphere, or power to regulate a class of persons or entities. Cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (jurisdiction refers to "a court's adjudicatory authority"—i.e., "prescriptions delineating the classes of cases * * * and the persons" implicating that authority). This interpretive exercise often yields a clear result. See Sales & Adler, 2009 U. Ill. L. Rev. at 1555–1556 (identifying categories of cases "it will be quite easy for courts to classify as jurisdictional"). As noted above, the court of appeals had little difficulty distinguishing between the two different kinds of statutory questions presented here: first, whether the FCC had authority *at all* to address what constitutes "a reasonable period

of time" under § 332(c)(7)(B)(ii); and second, whether the 90- and 150-day periods exceeded the FCC's authority.

Courts routinely engage in a similar line-drawing exercise in defining the jurisdiction of lower federal courts. See *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1244–1245 (2010); *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006). A series of recent cases has helped to bring clarity and structure to the distinction between jurisdictional and non-jurisdictional statutes. *Arbaugh*, 546 U.S. at 510–511. The principles courts apply in that context provide guidance for identifying limits on the jurisdiction of federal administrative agencies. See, *e.g.*, *Ry. Labor Execs.*, 29 F.3d at 676 (Williams, J., dissenting) (in addressing whether a jurisdictional issue affected the reviewability of agency action, observing that "courts commonly classify issues as relating to the 'jurisdiction' of Article III courts, and make consequences turn on the classification").

There are, to be sure, important differences between courts' subject-matter jurisdiction and the jurisdiction of administrative agencies. Those differences preclude adopting here the clear-statement rule from *Arbaugh*, 546 U.S. at 515–516.[6] But these

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[6] Under *Arbaugh*, courts will treat an issue as jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," but not "when Congress does not rank a statutory limitation on coverage as jurisdictional." 546 U.S. at 515. Because this rule treats ambiguous statutes as non-jurisdictional, importing it to the *Chevron* context would greatly expand the scope of issues for which

cases are nonetheless instructive on whether courts can draw principled and consistent distinctions between jurisdictional and non-jurisdictional statutes.

This Court recently addressed the distinction between jurisdictional and non-jurisdictional requirements in *Reed Elsevier*. The Court considered a number of different factors in interpreting the statute at issue. It focused "principally on [an] examination of the text of [the statute]," addressing whether it "clearly stat[es]" that a requirement "count[s] as jurisdictional." 130 S. Ct. at 1244 (internal quotation marks omitted). As part of that inquiry, the Court first considered whether anything in "prior * * * cases" showed that the requirement "imposed a jurisdictional limit." *Id.* Second, it asked whether the statute's "text and structure * * * demonstrate that Congress 'rank[ed]' th[e] requirement as jurisdictional." *Id.* (quoting *Arbaugh*, 546 U.S. at 513–516). The Court asked whether the provision was "located in a [statutory] provision 'separate' from * * * [the] jurisdiction-granting section," but did not suggest that factor was determinative. *Id.* (quoting *Arbaugh*, 546 U.S. at 514–515). And the Court considered generally whether the requirement "could * * * fairly be read to 'speak in jurisdictional terms or in any way refer to * * * jurisdiction.'" *Id.* (quoting *Arbaugh*, 546 U.S. at 515).

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agencies receive deference. Allowing agencies to define their jurisdiction based on ambiguous statutes would be at odds with the rule that agencies have only the authority specifically vested in them by Congress. *La. Pub. Serv. Comm'n*, 476 U.S. at 374; Sales & Adler, 2009 U. Ill. L. Rev. at 1534–1535.

Bowles v. *Russell*, 551 U.S. 205 (2007), gave close attention to how a provision has historically been treated. "*Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247–1248. *Bowles* analyzed not only the statute at issue, but also how courts had historically treated the "type of limitation" as found in other statutes. *Id.* at 1248; *Bowles*, 551 U.S. at 208–210.

In many cases, application of these interpretive tools will provide a clear indication that a question involves agency "jurisdiction"—in some cases because Congress or courts have explicitly so specified. For instance, *ABA* addressed whether attorneys engaged in the practice of law were "financial institutions subject to th[e] [FTC's] jurisdiction" within the meaning of 15 U.S.C. § 6804(a)(1). 430 F.3d at 459. Similarly, *Valley Freight* involved the question whether shipments were subject to a tariff based on the ICC's "'jurisdiction over transportation by motor carrier * * * on a public highway.'" 856 F.2d at 551 (quoting 49 U.S.C. § 10521 (1982)). This Court has repeatedly characterized the Clean Water Act's reference to "waters of the United States" as defining the regulatory "jurisdiction of the Corps." *SWANCC*, 531 U.S. at 168–171; accord *Rapanos*, 547 U.S. at 731 (plurality opinion) (the Clean Water Act "authorizes federal jurisdiction only over 'waters'"). And courts have defined the scope of FCC regulatory authority under its "ancillary jurisdiction." See, *e.g.*,

AT&T Corp., 525 U.S. at 380; *Midwest Video*, 440 U.S. at 697.

C. Well Established Background Principles Help Identify Jurisdictional Questions

Where the statutory text, case law, and historical context do not provide an immediate answer, courts can also look to several familiar principles in identifying jurisdictional questions.

First, jurisdiction is often implicated where an agency seeks to regulate in a way that affects the balance of authority between the federal government and the states—particularly where the agency is unable to cite clear statutory authorization for its actions. As reflected in this Court's clear-statement cases, Congress is presumed to be aware of, and not "readily interfere" with, the "usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460–461 (internal quotation marks omitted). It follows that when legislating in areas of traditional state authority, Congress will take care to limit federal agency jurisdiction to safeguard state interests.

Such concerns are highlighted in this case, where the FCC sought to regulate state and local land-use determinations despite an express reservation of rights over such decisions. They were also present in *SWANCC*, where the Corps' claim of federal jurisdiction to regulate wetlands "alter[ed] the federal-state framework" and "invoke[d] the outer limits of Congress' power" without a "clear indication that Congress intended that result." 531 U.S. at 172–173. The D.C. Circuit in *ABA* rejected the FTC's at-

tempt to regulate attorneys engaged in the practice of law "with no other basis than the observation that the [statute] did not provide for an exemption" for attorneys. 430 F.3d at 468. The court emphasized that "[t]he states have regulated the practice of law throughout the history of the country," and declined to extend federal law "into [that] are[a] of State sovereignty" "unless the language of the federal law compels the intrusion." *Id.* at 471.

Second, and for similar reasons, jurisdictional questions are likely to arise where a statute divides authority between two agencies, or between an agency and the courts. This case implicates the latter concern, with the FCC asserting authority to define what constitutes "a reasonable period of time" under § 332(c)(7)(B)(ii)—a question Congress directed would be decided by the courts. 47 U.S.C. § 332(c)(7)(B)(v). Lower courts have frequently declined to grant *Chevron* deference where agencies share administrative authority. See *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (surveying cases); Gellhorn & Verkuil, 20 Cardozo L. Rev. at 1017 ("[T]he usual presumption is that Congress does not intend to divide regulatory responsibility among two or more agencies."). This can occur not only for "generic statutes that apply to dozens of agencies," such as the Federal Advisory Committee Act, the Privacy Act, or the Administrative Procedure Act, but also for statutes such as the Federal Deposit Insurance Act, where a smaller group of agencies have specialized enforcement authority that potentially overlaps, creating risks of inconsistency or uncertainty. 351 F.3d at 1252–

1253. Similarly, DHS's assertion of authority to modify the adjudicatory powers of the Federal Labor Relations Authority raised questions of DHS's statutory jurisdiction. *NTEU*, 452 F.3d at 866. Declining to extend deference where Congress has divided authority between agencies or between an agency and the courts aligns with *Chevron*'s teaching that an agency is only entitled to deference over a statute that it is charged with administering. *Chevron*, 467 U.S. at 843; *Adams Fruit*, 494 U.S. at 649.

Third, jurisdictional issues are more likely to arise where an agency asserts a novel authority following long inaction or an affirmative disclaimer of authority. An agency's longstanding view that it lacks authority to regulate may reflect an accurate understanding of the enacting Congress's intent. Or, where Congress has amended an agency's organic statute over the years against the background of an agency disclaiming authority to regulate in an area, there may be scant reason to believe that Congress intended the agency to have jurisdiction in that area. Cf. Gellhorn & Verkuil, 20 Cardozo L. Rev. at 1012 ("[I]f the agency has not previously regulated the product or service, or asserted the power to do so, then there seems to be little basis for assuming that Congress would have wanted courts to defer to agency interpretations.").

This Court discussed these principles in *Brown & Williamson*, holding that Congress had "precluded the FDA from asserting jurisdiction to regulate tobacco products." 529 U.S. at 126. The Court addressed at length the history of "the FDA's disavowal of jurisdiction"—i.e., the agency's "consistent and re-

peated statements that it lacked [such] authority," and the fact that FDA had taken that position "since the agency's inception." *Id.* at 144–146. And in *ALA*, the D.C. Circuit emphasized that the FCC's assertion of authority to impose "broadcast flag" requirements broke with 70 years of practice and contradicted the Commission's prior statements to Congress that it lacked such authority. 406 F.3d at 691, 703. To be sure, not all shifts in policy implicate questions about agency jurisdiction. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). But "[t]he fact that an agency suddenly makes a choice it previously thought it legally could not make, when coupled with other factors, is a sign that the action may be jurisdictional." Sales & Adler, 2009 U. Ill. L. Rev. at 1560.

* * * * *

In sum, federal courts can identify statutes affecting an agency's jurisdiction in a principled and consistent way. The possibility of some close cases provides no justification to extend *Chevron* deference, especially where—as here—the statute involves the clearly-jurisdictional threshold question of whether Congress delegated authority for the agency to act at all.

CONCLUSION

The Court should vacate the judgment below and remand for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 11-1545 & 11-1547

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,

AND

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTEREST OF *AMICI CURIAE*[1]

AT&T has an interest in this case for two reasons. First, AT&T's subsidiaries provide a broad range of telecommunications and information services, including voice, Internet, and video programming services. Accordingly, the extent to which particular services are within the regulatory jurisdiction of the Federal Communications Commission ("FCC" or "Commission") is an important issue to AT&T, as it is to the industry generally. AT&T believes that independent judicial review of the Commission's attempts to assert jurisdiction over new technologies and new services is vital, and therefore urges this Court to hold that *Chevron* deference does not apply to statutory interpretations that the Commission adopts in determining the extent of its own jurisdiction.

Second, because some of AT&T's subsidiaries provide wireless service, AT&T also has a particular interest in the FCC order under review. AT&T participated in the proceedings before the FCC and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that (except as follows) none of the parties or their counsel, nor any other person or entity other than *amici*, their counsel, or their members, made a monetary contribution intended to fund the preparation or submission of this brief. Certain counsel for *amici* also serve as counsel for respondent CTIA—The Wireless Association and participated in (among other work for CTIA on this case) the preparation of the joint brief in opposition to certiorari of CTIA and respondent Cellco Partnership d/b/a Verizon Wireless ("Verizon"). CTIA has not filed a brief at the merits stage of this case. After CTIA determined that it would not file a merits brief, counsel were retained to prepare this *amicus* brief for AT&T and the United States Telecom Association. Petitioners and respondents have consented to the filing of this brief, and letters granting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

submitted information showing that local zoning authorities around the country were unreasonably delaying action on wireless facility siting requests. However the Court may rule on the question presented, AT&T urges the Court to uphold the Commission's order on the ground that the Commission clearly did have jurisdiction to interpret and enforce the local zoning provisions of the Telecommunications Act of 1996.

The United States Telecom Association ("USTelecom") is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom's member companies offer a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable. They range from large, publicly traded companies to small rural cooperatives, spanning all seven continents and more than 225 countries. Collectively, they represent hundreds of billions of dollars in investment, have annual revenues in the tens of billions of dollars, and employ millions of workers.

INTRODUCTION AND SUMMARY

AT&T and USTelecom support the position of respondent Verizon: this Court should hold that *Chevron*[2] deference does not apply to an agency's interpretation of its own statutory jurisdiction, but should nevertheless affirm the judgment of the court of appeals on the alternative ground that the Federal Communications Commission ("FCC" or "Commission") had clear, unambiguous jurisdiction to issue the order under review based on the text of the Communica-

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[2] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

tions Act of 1934 ("Communications Act" or "Act") and on this Court's decision interpreting that Act in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Verizon and other parties and *amici* in this case have ably set forth reasons that the structure of the *Chevron* doctrine and underlying principles of the separation of powers require independent judicial review when agencies interpret statutes to resolve questions about their own jurisdiction – and, in particular, whether Congress has authorized them to speak with the force of law on particular topics.

Thus, for example, Verizon and others persuasively rely on the rule of *United States v. Mead Corp.*, 533 U.S. 218 (2001), under which the question whether an agency can speak with the force of law precedes (rather than follows) the question whether its pronouncements should receive *Chevron* deference. *See* Verizon Br. 12-14; *see also* Arlington Br. 18-24; Int'l Municipal Lawyers Ass'n et al. Br. 22-26 ("IMLA Br."). As Verizon points out, agencies have no authority except that which Congress grants them. Thus, while agencies enjoy some judicial deference when filling in the details of a statutory scheme that Congress has charged them with administering, the *Chevron* doctrine necessarily "rests on the fundamental assumption that Congress has delegated to the agency policymaking authority over the particular matter at issue." Verizon Br. 12.

Further, Verizon and others argue forcefully that independent judicial review of agencies' jurisdictional determinations is necessary to protect important separation-of-powers principles by ensuring that those unelected agencies exercise only jurisdiction that Congress actually meant to grant them – as

opposed to jurisdiction that Congress *might* have intended to grant and did not clearly withhold. *See id.* at 17-24; *see also* IMLA Br. 27-32. Independent review is also necessary to provide an adequate check on agencies that attempt to expand their jurisdiction beyond the boundaries that Congress intended. *See, e.g.*, American Farm Bureau et al. Br. 10-26 ("AFB Br.") (collecting examples of "agency aggrandizement"). AT&T and USTelecom fully endorse these arguments.

I. This brief primarily addresses a countervailing argument that is based not on core principle, but on a more practical concern – specifically, the concern that it is impossible to draw a workable line between questions about agency jurisdiction and other questions about whether an agency's actions are consistent with nonjurisdictional statutory mandates. This argument is usually traced to Justice Scalia's concurrence in the judgment in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), which contended that "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Id.* at 381 (Scalia, J., concurring in the judgment). AT&T and USTelecom respectfully contend that this line can be drawn: this Court has frequently distinguished between jurisdictional and nonjurisdictional questions in administrative law generally and in telecommunications law specifically.

A. In administrative law generally, the question whether an agency is authorized to speak with the force of law on a particular subject matter has become very important in this Court's *Chevron* cases since *Mead*. Nothing in the Court's experience since that time suggests that an agency's jurisdiction

(or lack thereof) is inextricably entangled with the substantive merits of its pronouncements. On the contrary, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), and other cases, this Court has distinguished between these different issues without difficulty.

B. In telecommunications law specifically, this Court has frequently distinguished questions that relate to the scope of the Commission's jurisdiction under the Communications Act from those that relate to how the Commission exercises that jurisdiction. Further, the Commission itself has maintained the distinction between jurisdictional and non-jurisdictional issues in its own decisionmaking, showing that this distinction is useful analytically even apart from its significance for judicial review.

This case is a further illustration. Petitioners have contended that the Commission lacks jurisdiction to interpret and enforce the federal restrictions on local zoning authority contained in 47 U.S.C. § 332(c)(7)(B)(i) and (ii), which prevent local authorities from using that authority to impede the site-by-site construction of a nationwide, seamless, competitive wireless network. In their view, the Commission has nothing (or at least nothing binding) to say about these provisions, because Congress instead intended them to be interpreted exclusively by the courts. Congress certainly *could* have limited the Commission's authority as petitioners suggest – though their evidence that it actually did so is lacking. Such a limitation (if it existed) would be a jurisdictional one, so petitioners are entitled to independent judicial review of their contentions.

C. Although some hard cases will raise jurisdictional issues that are more difficult to distinguish from the merits of agency action, that is not a reason

to abandon the distinction entirely. The need for an effective judicial check on expansions of administrative jurisdiction is too great. Instead, this Court should give the lower courts guidance for resolving close cases based on the principles underlying *Chevron* deference. Of these, the most important is whether the agency is seeking a major expansion of its mandate that Congress would not likely have conferred through ambiguity or silence; or, on the other hand, whether the issue at stake is a smaller, interstitial one that Congress might so have delegated.

II. Regardless of this Court's answer to the question presented, it should affirm the judgment below on the alternative ground that the Commission clearly had jurisdiction to interpret and enforce § 332(c)(7)(B)(i) and (ii). This alternative ground for affirmance was properly preserved by private respondents CTIA—The Wireless Association ("CTIA") and Verizon in opposing certiorari; it follows clearly from the text of the Communications Act and from *Iowa Utilities Board*; and it is important enough to warrant this Court's attention in a case that has already received plenary briefing and argument.

ARGUMENT

I. THERE IS A FEASIBLE DISTINCTION BETWEEN JURISDICTIONAL AND NON-JURISDICTIONAL QUESTIONS FOR *CHEVRON* PURPOSES

Petitioners and respondent Verizon have made a strong case in favor of denying *Chevron* deference to questions of statutory construction concerning the scope of an agency's jurisdiction. This brief addresses a particular counter-argument: the idea that, whether or not it might be desirable in principle to distinguish between those jurisdictional and non-

jurisdictional issues for *Chevron* purposes, it is not feasible to do so in practice. The leading authority for this argument is Justice Scalia's concurrence in the judgment in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), which contended that "giving deference to an administrative interpretation of [agency] statutory jurisdiction or authority is . . . necessary" because

> there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority."

Id. at 381 (Scalia, J., concurring in the judgment). AT&T and USTelecom respectfully contend that, on the contrary, a line can be drawn that separates jurisdictional questions from nonjurisdictional ones.

In drawing that line it is important to recognize that "[j]urisdiction," here as elsewhere, "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). Although the word "jurisdiction" can be and often has been used by this Court and others to refer to many types of limits on an agency's ability to act,[3] this case presents a particu-

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[3] For example, in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court deferred to the CFTC on the question whether that agency could "exercise jurisdiction over counterclaims arising out of the same transaction as [a] . . . reparations dispute" under the CFTC's statute. *Id.* at 845-46; *see Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment) (citing *Schor* as a case in which the Court

lar *type* of question about an agency's jurisdiction: whether Congress has authorized an agency to speak (by rule or by order) with the force of law as to a particular statutory provision or subject matter. In this case, that question manifests concretely as a dispute over whether the FCC can issue a declaratory ruling that becomes binding in subsequent litigation under 47 U.S.C. § 332(c)(7) in the district courts. *See, e.g.*, Arlington Br. 13 (identifying this case as a "challenge [to] the validity of rules promulgated by the FCC that purport to adopt binding interpretations of Section 332(c)(7)").

Practice and precedent show that this Court can and does distinguish at least this type of jurisdictional dispute (that is, a dispute about agency authority to speak with the force of law on a given subject matter) from disputes about the merits of a particular action that the agency has taken. Similarly, in telecommunications law (including many cases that precede *Chevron* and *United States v. Mead Corp.*, 533 U.S. 218 (2001)), both this Court and the FCC itself have long analyzed the existence and extent of the Commission's jurisdiction separately from the merits of its actions. This case itself is an example: petitioners' arguments that the Commission lacks authority to interpret and enforce § 332(c)(7)(B) are unmistakably *jurisdictional* arguments (though not in our view strong ones). There will of course be harder cases than this one. But the mere possibility of hard cases should not persuade this Court to

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deferred to "an agency's interpretation of its own statutory authority or jurisdiction"). The counterclaims in *Schor* arose under state common law. *See* 478 U.S. at 837-39. The adjudicatory jurisdiction that the CFTC sought to exercise over them was thus far removed from the jurisdiction that the FCC has asserted here to interpret and enforce the Communications Act.

abandon the distinction between jurisdictional and nonjurisdictional issues, because – as Verizon and others have persuasively argued – that distinction is grounded in the separation of powers and other important concerns.

A. This Court Has Distinguished Jurisdictional from Nonjurisdictional Questions in *Mead* and Other Cases

This Court has drawn the necessary distinction between jurisdictional and substantive review of administrative action in cases applying *Mead*. Under that case, the question whether a statutory interpretation put forward in the course of agency action warrants deference under *Chevron* itself turns on whether Congress has "expressly delegated authority or responsibility to implement a particular provision or fill a particular gap," or whether it is otherwise "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229-30.[4] As several parties have observed, *Mead* implies that a reviewing court must determine without deference whether Congress has given an agency the authority to speak with the force of law on a particular subject, because the court must make that initial determination before it knows

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[4] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173-74 (2007) (listing whether an agency "rule falls within the statutory grant of authority" as one of the factors to be considered in determining whether "Congress intended [a court] to defer to the agency's determination").

whether deference is due. *See* Verizon Br. 12-14; *see also* Arlington Br. 18-24; IMLA Br. 22-26.[5]

The Court has applied this standard in later cases without apparent difficulty – including in one case, *Gonzales v. Oregon*, 546 U.S. 243 (2006), that called for fine distinctions about the scope of administrative jurisdiction. In *Gonzales*, this Court confronted the question whether the Attorney General should receive *Chevron* deference for an interpretive rule that had found that prescriptions of medications for assisted suicide were not for a "'legitimate medical purpose'" within the meaning of the Controlled Substances Act ("CSA"). *Id.* at 258 (quoting 21 U.S.C. § 830(b)(3)(A)(ii)). The Court opened the section of its opinion dealing with *Chevron* by observing that the phrase "legitimate medical purpose" itself is "susceptible to more precise definition and open to varying constructions," *id.*; thus, it is the kind of ambiguous provision to which *Chevron* deference *could* have applied if the Attorney General had been acting "pursuant to authority Congress has delegated." *Id.*

But the Court nevertheless did not defer, because it found that "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law." *Id.* at 268. In reaching this conclusion, it employed the traditional tools of statutory construction, considering matters

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[5] *See also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1130 (2008) ("Eskridge & Baer") (observing that, in light of "*Mead*'s holding that *Chevron* rests upon Congress's delegation of lawmaking authority to the agency[,] . . . one would expect the Court to take care that there actually has been such a delegation") (emphasis omitted).

including the "language of the delegation provision itself," which granted the Attorney General only "limited powers," *id.* at 258-59; the "anomalous" nature of the Attorney General's assertion that the statute gave him the power to "criminalize . . . the actions of registered physicians, whenever they engage in conduct he deems illegitimate," *id.* at 262; and the "design of the statute" as a whole and its "allocat[ion] [of] decisionmaking powers among statutory actors," including the Secretary of Health and Human Services, *id.* at 265. As Arlington notes (at 22-23), nothing in *Gonzales* suggests that the Court deferred to the Attorney General concerning the limits of his authority under the CSA. Nor is there any suggestion that the *Gonzales* Court had difficulty drawing a line between the question whether "the CSA . . . g[a]ve the Attorney General authority to issue the Interpretive Rule as a statement with the force of law" and the question whether "his substantive interpretation is correct." 546 U.S. at 268; *see id.* (stating that the latter question "remain[ed]" to be answered after the former was resolved).

In other post-*Mead* cases, the Court likewise considered whether the agency was authorized to speak with the force of law as to the meaning of the statutory provision at issue *before* applying *Chevron* deference to the agency's interpretation of that statute. Thus, in *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011), the Court applied *Chevron* deference to a Treasury Department rule but only after finding clear jurisdiction from the "explicit authorization" given the Treasury Department "to 'prescribe all needful rules and regulations for the enforcement' of the Internal Revenue Code." *Id.* at 714 (quoting 26 U.S.C. § 7805(a)).

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Court treated the FCC's authority under § 201(b), the same provision at issue in this case, as a necessary predicate for applying *Chevron* deference to the FCC's regulation in that case. *See id.* at 980-81. And in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), the Court applied *Chevron* deference after finding clear jurisdiction of the Federal Reserve Board to promulgate certain regulations as (among other things) "'necessary or proper to effectuate the purposes of'" the Truth in Lending Act. *Id.* at 238 (quoting 15 U.S.C. § 1604(a)).

To be sure, the agency-jurisdictional questions in *Mayo Foundation*, *Brand X*, and *Household Credit* were not difficult ones: unlike *Gonzales*, those cases did not feature dissents on the jurisdictional issues, and indeed this Court noted in two instances that the jurisdiction of the relevant agency was not even in dispute. *See Brand X*, 545 U.S. at 981; *Household Credit*, 541 U.S. at 238. But that does not undermine the ability of those cases to show that a workable distinction between jurisdictional and nonjurisdictional arguments can be drawn for purposes of *Chevron* deference. On the contrary, the fact that there were no contested questions of agency jurisdiction in those cases – where there were parties with an obvious interest in raising any such arguments that were available – only strengthens the inference that the line was a clear one.

B. Telecommunications Law Has Long Recognized the Distinction Between Jurisdictional and Nonjurisdictional Questions

1. This Court Has Treated the Commission's Jurisdiction as a Distinct Legal Issue

In telecommunications law in particular, this Court has spent much time and effort on determining the extent of the FCC's jurisdiction over particular types of communications and other activities, in cases that distinguished the agency's jurisdiction from the substance of any particular action that the agency might take. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), was one of this Court's first major cases interpreting the Communications Act, and it concerns almost entirely whether the Commission's "authority to make special regulations applicable to radio stations engaged in chain broadcasting," 47 U.S.C. § 303(i), among other provisions, applied merely to "technical and engineering impediments" that might arise from chain broadcasting, or whether it also had "power to deal with network practices found inimical to the public interest." 319 U.S. at 217-19. The Court addressed this basic question of authority separately from "the claim that the Commission's exercise of such authority was unlawful." *Id.* at 224.

Later cases have continued to treat the extent of the Commission's jurisdiction as a threshold question to be addressed separately – often in separate cases – from the substantive merits of a particular action within that jurisdiction. In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court considered whether the Commission had jurisdiction

to regulate cable television[6] and concluded that it did. In reaching that conclusion, the Court distinguished the question "whether the Commission has authority under the Communications Act to regulate [cable] systems" from any "questions as to the validity of the specific rules promulgated by the Commission for the regulation of [cable]." *Id.* at 167; *see id.* ("emphasiz[ing]" that the latter questions were "not . . . before the Court").[7] It held that the Commission had authority to regulate cable so long as its regulations were "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting," *id.* at 178, and left elaboration of that standard to later cases.[8]

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[6] Congress later granted the Commission express regulatory jurisdiction over certain aspects of cable television in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *Southwestern Cable* concerned the Commission's jurisdiction prior to those amendments.

[7] *Southwestern Cable* also considered a separate question of the Commission's "authority under the Communications Act," namely, whether the Commission could "issue the particular prohibitory order in question." 392 U.S. at 178. Although it called this a question of "authority," the Court was not addressing the type of jurisdiction at issue in this case. All that was at stake was whether the Commission had been required to hold a hearing. *See id.* at 179-80; *see also supra* pp. 7-8 & n.3.

[8] The Court returned to the question of the FCC's pre-1984 authority to regulate cable television in the Midwest Video cases. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 670 (1972) (plurality opinion) (upholding as "within the Commission's authority recognized in *Southwestern [Cable]*" FCC regulations requiring cable companies to originate their own programming); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707-08 (1979) (striking down rules requiring cable companies to carry public access programming as outside that authority).

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ("*Louisiana PSC*"), the Court held that the Commission lacked jurisdiction to regulate the way in which telecommunications carriers depreciated telephone plant and equipment insofar as it was used to provide intrastate services. The *Louisiana PSC* Court observed that this jurisdictional decision had nothing to do with "the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry," or even "whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose." *Id.* at 359. Instead, the Court focused exclusively on determining "where Congress *has* placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate telephone service." *Id.* After concluding that this responsibility belonged to the states, the Court went no further.

Perhaps more than any other case, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (which also controls the particular issue of jurisdiction at stake in this case, *see infra* Part II), illustrates the feasibility of distinguishing the Commission's jurisdiction to regulate a particular area and other questions about its compliance with substantive statutory restrictions and mandates. In that case, the Court upheld against a "jurisdictional" challenge, 525 U.S. at 374, the FCC's rules requiring that prices for the interconnection and unbundling that incumbent carriers must offer to their competitors under the Telecommunications Act of 1996 ("1996 Act") be set according to "Total Element Long Run Incremental Cost," or "TELRIC." *See id.* at 377-86. The Court made clear that it was deciding only the question whether the

Commission had the authority to set some pricing methodology and that "the merits of TELRIC [were] not before" the Court at the time. *Id.* at 374 n.3. The Court indeed did not reach those merits until several years later. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 493 (2002) ("In [*Iowa Utilities Board*], this Court upheld the FCC's jurisdiction to impose a new methodology on the States when setting [1996 Act] rates. The attack today is on the legality and logic of the particular methodology the Commission chose.").

In sum, judicial review of FCC actions has routinely required this Court to distinguish between questions concerning the subjects over which the Commission may properly exercise jurisdiction and questions concerning the "legality and logic," *id.*, of such an exercise. These questions can be and are appealed separately, analyzed separately, and decided differently with respect to an individual rule or order. There is no reason to think that this existing distinction will cease to be workable if this Court holds that the Commission should not receive *Chevron* deference in cases of the former kind.

2. The Commission Also Treats Its Own Jurisdiction as a Distinct Legal Issue

The Commission's own decisions frequently draw the same distinction between the agency's jurisdiction and the statutory viability of decisions it makes in exercising that jurisdiction.[9] Often, the Commis-

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[9] Indeed, the Commission has expressly distinguished "a challenge to the Commission's ultimate 'jurisdiction' or authority over [certain] traffic under section 2 of the [Communications] Act" from "a challenge to the *manner* in which the Commission exercised its jurisdiction over [that] traffic in the circumstances presented." Memorandum Opinion and Order, *General Commu-*

sion has framed the jurisdictional inquiry in the specific language of whether its "subject matter jurisdiction" extends to a particular area of conduct, such as services that use Internet Protocol to carry voice messages and are interconnected with the public switched telephone network;[10] voicemail and interactive phone menu services;[11] and the practice by incumbent cable operators of entering into exclusive arrangements with the owners of large residential buildings to provide video programming to the residents of those buildings.[12] Nor is this approach new:

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nication, Inc. v. Alaska Communications Sys. Holdings, Inc., 16 FCC Rcd 2834, ¶ 28 (2001) (correcting a party for failing to observe this distinction in its arguments), *petition for review granted in part and denied in part, vacated and remanded in part on other grounds, ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

[10] *See* First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services*, 20 FCC Rcd 10245, ¶ 28 (2005) (finding that "these services come within the scope of the Commission's subject matter jurisdiction granted in section 2(a) of the [Communications] Act"), *petition for review denied, Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

[11] *See* Report and Order and Further Notice of Inquiry, *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, ¶ 95 (1999) (asserting "subject matter jurisdiction over . . . voicemail and interactive menus").

[12] *See* Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶¶ 53-54 (2007) (asserting the "subject matter jurisdiction granted in Title I" of the Communications Act as an alternative basis for regulating such practices), *petitions for review denied, National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

similar cases can be found going back decades.[13] More recently, the extent of the Commission's jurisdiction over wireless and wireline Internet services has been hotly contested in proceedings before the D.C. Circuit.[14]

Further, even in cases where the Commission has not used explicitly jurisdictional language, it has nevertheless observed the distinction between its authority to issue binding rules or orders on a particular subject and the substantive justification for its use of that authority. Thus, the Commission has a well-established practice of breaking out issues of jurisdiction and rulemaking authority from the merits of particular regulatory endeavors.[15] That

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[13] *See* Memorandum Opinion and Order, *AT&T Co.*, 23 FCC 689, ¶ 3 (1957) (noting, with regard to a proposed tariff filed by AT&T, that "[o]nly if the question of our jurisdiction . . . is resolved in the affirmative will it be necessary or proper for the Commission to consider the merits of the tariff under the standard of justness and reasonableness which is the statutory test").

[14] *See Cellco P'ship v. FCC*, Nos. 11-1135 & 11-1136, 2012 WL 6013416, at *1, *4-7 (D.C. Cir. Dec. 4, 2012) (designated for publication) (upholding the FCC's jurisdiction to regulate the terms of "roaming agreements" between providers of mobile wireless Internet services); *Comcast Corp. v. FCC*, 600 F.3d 642, 644, 651-61 (D.C. Cir. 2010) (vacating for lack of sufficient explanation the FCC's attempt to exercise jurisdiction of the network management practices of Internet service providers).

[15] *See, e.g.*, First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 18 (2010) (addressing the FCC's "statutory authority . . . to consider complaints alleging unfair acts involving terrestrially delivered, cable-affiliated [video] programming" before considering the rules it would apply in resolving such complaints), *petitions for review granted in part and denied in part, vacated and remanded in part on other grounds*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir.

practice helps to show that it would be unwarranted for this Court to accord *Chevron* deference to the Commission's conclusions about the extent of its own jurisdiction out of a concern that no distinction between jurisdictional and nonjurisdictional questions can be maintained. In all likelihood, the agency itself would continue to draw the same distinctions in its own cases, but the courts' ability to review its reasoning and check it when it overreaches would be needlessly impaired.

3. This Case Illustrates the Feasibility of Distinguishing Jurisdictional from Nonjurisdictional Questions

Another illustration of the viable distinction between jurisdictional and substantive questions in review of agency action can be found in this very case. Petitioners and their supporters have argued persistently throughout these proceedings that Congress intended the courts, and not the Commission, to decide what types of local-government conduct "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services" within the meaning of § 332(c)(7)(B)(i)(II), and what is a "reasonable period of time" for a locality to consider a tower siting application under § 332(c)(7)(B)(ii). *See, e.g.*, Arlington Br. 31; CTTC Br. 21-22, 24, 35, 37. AT&T and USTelecom agree with the Commission and with Verizon that these statutory arguments lack force.

2011); Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 53 (2007) (finding "that the Commission has the authority to adopt rules to implement Title VI" of the Communications Act), *petitions for review denied, Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

See infra Part II. But, whether strong or weak, they are jurisdictional arguments. They concern whether the Commission has the ability to issue a rule or order that (after judicial review under the Administrative Procedure Act is complete) will affect the rights of carriers and localities in future proceedings in the district courts.

By contrast, the other arguments that petitioners have raised about the same statutory provisions (of which this Court did not grant review) concern matters that are clearly not jurisdictional. For example, in opposing the Commission's construction of § 332(c)(7)(B)(ii), petitioners have contended that Congress intended the standard for a "reasonable period of time" to vary in different localities across the country. *See, e.g.*, Pet. App. 59a-60a. These arguments could be made to a district court in the first instance just as well as to the Commission. They concern the substantive content of the statute, rather than the identity of the administrative or judicial actor who should interpret and enforce those directives. Once it is determined that the Commission has jurisdiction to interpret and enforce § 332(c)(7)(B), its view about what is a "reasonable period of time" is a proper subject for *Chevron* deference.

C. Any Line-Drawing Difficulty Does Not Justify *Chevron* Deference for Agency Determinations of Jurisdiction

1. To be sure, the clarity of the line between jurisdictional and nonjurisdictional issues in this case does not mean that there may not be other cases in which that line may be harder to find. Such hard cases should be rare, and in any event there is no reason to think that they will leave courts unable to

decide in a principled way whether or not *Chevron* deference is appropriate. As this Court commented in *Mead*, courts will be able to make "reasoned choices between . . . examples" set by precedent, as "courts have always done." 533 U.S. at 237 n.18. In any event, as Verizon and other parties have shown in detail, and we reprise only briefly here, the reasons for denying *Chevron* deference to agency determinations of jurisdiction are sufficiently weighty to overcome any remaining concerns about workability.

First, the "axiom[] that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), is well worth preserving and would be undermined by a notion of deference that would grant agencies powers that (in a court's own best judgment) Congress intended to withhold. Such deference would leave little of the principle "that an agency may not bootstrap itself into an area in which it has no jurisdiction," which this Court unanimously called "fundamental" in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (internal quotation marks omitted), six years after *Chevron* was decided.

Second, deference to an agency's assertion of expanded jurisdiction lacks any basis in the theory underlying *Chevron* itself. That theory is that courts lack the institutional competence to decide "a challenge to an agency construction of a statutory provision [that], fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866; *see* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2379 (2001) (suggesting that *Chevron*

"rests (in part or in whole) on notions of comparative institutional competence and legitimacy"). An argument that an agency lacks jurisdiction over particular subject matter does not suffer from this flaw: it amounts instead to a claim that, however wise the policy the agency is attempting to implement, Congress did not intend the agency to fill *this* gap.

Third, if agencies can freely establish jurisdiction over new subject matter based on merely reasonable constructions of ambiguous jurisdictional language, they will inevitably over time seize more and more territory for themselves. As *amici* American Farm Bureau et al. have shown with numerous examples, this is a real and not a theoretical phenomenon. *See* AFB Br. 10-26.

2. In any event, this Court can and should provide guidance that will help the lower courts to resolve hard cases based on principles that it has already recognized. Where a question is arguably jurisdictional (but also arguably not), the courts should look to other characteristics of the case before them to determine whether applying deference would be consistent with Congress's (actual or presumed) intention. The most important such characteristic should be whether the challenged agency action is "interstitial [in] nature," *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), or whether it is instead a matter of "economic and political significance" that Congress would not likely delegate to an agency in a "cryptic" fashion, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see Gonzales*, 546 U.S. at 267-68 ("The importance of the issue of

physician-assisted suicide . . . makes the oblique form of the claimed delegation all the more suspect.").[16]

Other factors that might counsel for or against deference in close cases may include whether the agency possesses "related expertise," *Barnhart*, 535 U.S. at 222; whether on the other hand the dispute "concern[s] common law or constitutional law" issues, as to which agencies lack special competence, Breyer, 38 Admin. L. Rev. at 370; and whether under the circumstances the court is satisfied that the agency "can be trusted to give a properly balanced answer," rather than "seek[ing] to expand [its] power," *id.* at 371. By relying on these considerations, courts will still be able to make appropriate choices between deferential and independent review even in cases (which will be few) where the line between jurisdictional and nonjurisdictional issues is hard to find.

II. THE COMMISSION HAS CLEAR JURISDICTION TO INTERPRET AND ENFORCE § 332(c)(7)(B)(i) AND (ii)

Regardless of the degree of deference due the Commission on jurisdictional questions, the Court should affirm the judgment of the court of appeals because the Commission had clear jurisdiction to issue the order under review. The Commission is authorized to "prescribe such rules and regulations

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[16] *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("Breyer") ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); Eskridge & Baer, 96 Geo. L.J. at 1130 (arguing that courts are "capable of distinguishing between wholesale and retail applications of a statute," where wholesale applications involve "new categor[ies] of applications" and retail ones involve "matter[s] of detail").

as may be necessary in the public interest to carry out the provisions of" the Communications Act. 47 U.S.C. § 201(b). Section 332(c)(7)(B) is such a "provision[]," *id.*, because Congress added it to the Communications Act as one of the amendments made by the 1996 Act. Section 332(c)(7)(B), moreover, contains federal mandates that take certain aspects of zoning decisions out of the hands of local authorities. This Court confirmed in *Iowa Utilities Board* that, when Congress thus "expan[ds] . . . the substantive scope of the [Communications] Act," it also "expan[ds] . . . Commission jurisdiction" to interpret and enforce the Act. 525 U.S. at 380. Accordingly, the Commission had jurisdiction to make a rule (or, in the present case, issue an order) setting forth a binding interpretation of § 332(c)(7)(B)(i) and (ii). The merits of that interpretation are subject to judicial review under *Chevron*'s deferential standard.

This Court can always affirm a judgment below on an alternative ground. *See, e.g., United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011). It should do so here for four reasons. *First*, as set forth below, the question whether the FCC had jurisdiction here is a straightforward matter of statutory construction that this Court can resolve on the face of the Communications Act and in light of the controlling precedent supplied by *Iowa Utilities Board*. *Second*, the alternative ground was called to the attention of the Court and the parties in the brief in opposition filed by CTIA and Verizon at the certiorari stage of this proceeding. *See* CTIA/Verizon Br. in Opp. 13, 16-24. *Third*, the alternative ground has been addressed in the briefs of the parties. *See* Arlington Br. 34-44; CTTC Br. 47-53; Verizon Br. 30-33. *Fourth*, the alternative ground would permit the Court – regard-

less of its views on the Fifth Circuit's reasoning – to uphold the FCC's order without further proceedings and so to promote the national interest in "the deployment of advanced wireless communications services . . . in all geographic areas in a timely fashion," Pet. App. 102a-103a, and in "the promotion of advanced services and competition that Congress [has] deemed critical," *id.* at 105a.

A. Section 201(b) Gives the Commission Jurisdiction To Enforce § 332(c)(7) as Part of the Communications Act

Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Act of May 31, 1938, ch. 296, 52 Stat. 588 (codified at 47 U.S.C. § 201(b)).[17] The "Act" here is the Communications Act of 1934. Accordingly, when Congress enacts a substantive statutory mandate as a part of the Communications Act, § 201(b) gives the Commission jurisdiction – the authority to speak with legal force – in order to interpret and enforce that mandate. As this Court put it in *Iowa Utilities Board*, "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include [provisions] added by the Telecommunications Act of 1996." 525 U.S. at 378.[18]

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[17] The version printed in the U.S. Code (which has not been enacted into positive law) refers to the provisions of "this chapter." 47 U.S.C. § 201(b). The relevant chapter includes the entire Communications Act, as amended.

[18] The order under review also relies on several other provisions of the Communication Act that grant authority to the FCC. *See* Pet. App. 87a-88a (citing §§ 1, 4(i), and 303(r) of the

The provisions at stake in *Iowa Utilities Board* were §§ 251 and 252 of the Act, which concerned the introduction of competition into previously non-competitive local telephone markets. Local telephone service was an area that previously had been reserved to the states under § 2(b) of the Act, 47 U.S.C. § 152(b). *See generally Louisiana PSC*, 476 U.S. at 368-76. But the Court nevertheless found dispositive evidence of Congress's intent to convey jurisdiction to the Commission in the "clear fact" that Congress had made the 1996 Act "not as a freestanding enactment, but as an amendment to, and hence *part of*, [the Communications] Act," and so subject to the general grant of authority in § 201(b). *Id.* at 378 n.5.

That holding controls here. Section 332(c)(7)(B) is as much a part of the 1996 Act, and thus as much a part of the Communications Act, as were the local-competition provisions analyzed in *Iowa Utilities Board*. *See* 47 U.S.C. § 332 note; Pub. L. No. 104-104, § 704(a), 110 Stat. 56, 151-52. That section's substantive requirement that local review of a wireless facility siting application be limited to a "reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), and its proscription of any state or local government action that "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services," *id.* § 332(c)(7)(B)(i)(II), expand the substantive scope of the Communications Act.[19] Rules interpreting and

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Act, 47 U.S.C. §§ 151, 154(i), 303(r)). This brief, following *Iowa Utilities Board*, focuses on § 201(b).

[19] By contrast, *Iowa Utilities Board* noted that its holding would not apply where "Congress has remained silent" as to a particular subject matter, 525 U.S. at 382 n.8 – and so left it unregulated by federal law. Thus, when the FCC has attempted to assert jurisdiction but has "failed to tie" that asserted

enforcing those specific provisions (and construing their obviously ambiguous provisions, such as the length of a "reasonable period of time") are therefore within the Commission's jurisdiction under § 201(b). The judgment of the court of appeals can accordingly be affirmed using the traditional tools of statutory construction, and on the authority of *Iowa Utilities Board*, without any need for *Chevron*.

B. None of Petitioners' Arguments Creates Ambiguity About the Application of § 201(b)

1. Neither § 332(c)(7)(A) nor § 332(c)(7)(B)(v) Withdraws Jurisdiction from the Commission

Petitioners rely on two provisions of § 332(c)(7) to support their argument that the Commission lacks jurisdiction to interpret and enforce the substantive restrictions placed on local authorities by § 332(c)(7)(B)(i) and (ii). Neither of these arguments casts doubt on the Commission's jurisdiction.

a. The City of Arlington relies (at 31, 41) on § 332(c)(7)(A). That subsection provides that, "[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Arlington argues that, "like the provision at issue in *Louisiana PSC*, Section 332(c)(7) is an 'express jurisdictional limitation[] on FCC power' that 'fences off' State and local authorities 'from FCC reach or regulation,' except as specifi-

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authority to "any 'statutorily mandated responsibility'" of the agency, courts have properly set its actions aside. *Comcast*, 600 F.3d at 661 (rejecting FCC's attempt to "assert[] . . . ancillary authority over Comcast's Internet service" for this reason).

cally provided in the statute." Arlington Br. 32 (quoting 476 U.S. at 370) (alteration in original). This argument is wrong for four reasons.

First, § 332(c)(7)(A) on its face contemplates that the other provisions of § 332(c)(7) (i.e., other things in "this paragraph") can and will limit or affect local zoning authority. It is thus substantially narrower than § 2(b), the provision discussed in the portion of *Louisiana PSC* that Arlington quotes. Section 2(b) instructs that "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service," 47 U.S.C. § 152(b), with certain enumerated exceptions that were not relevant to *Louisiana PSC* or *Iowa Utilities Board*. Here, § 332(c)(7)(A) contains exceptions that are directly relevant to this case. The substantive provisions of § 332(c)(7)(B) are "expansion[s] of the substantive scope," *Iowa Utils. Bd.*, 525 U.S. at 380, of the Communications Act. And *Iowa Utilities Board* teaches that such substantive expansions carry with them corresponding "expansion[s] of Commission jurisdiction." *Id.*

Second, the comparison between § 2(b) and § 332(c)(7)(A) is instructive for another reason: § 2(b) *does* contain a clear limitation on the Commission's jurisdiction of the kind that Arlington claims is found in § 332(c)(7)(A). Thus, § 2(b) shows that, when Congress meant to restrict the Commission's jurisdiction, it was fully capable of explicitly referring to "jurisdiction" when it did so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

(alteration in original; internal quotation marks omitted).

Third, even if § 2(b) and § 332(c)(7)(A) were textually similar (which they are not), Arlington's argument would still be foreclosed by *Iowa Utilities Board*. In that case, the Court rejected an argument virtually identical to the one that Arlington advances here: that § 2(b) prevented the Commission from exercising jurisdiction to interpret and enforce provisions of the 1996 Act concerning matters that before the 1996 Act had been entirely reserved to the states. *See* 525 U.S. at 378-79. The Court concluded that, after Congress had "extend[ed] the Communications Act into local competition," § 2(b) "continue[d] to function" – and to restrain the Commission's jurisdiction – only as to "aspect[s] of intrastate communication *not* governed by the 1996 Act." *Id.* at 382 n.8. Applying the same reasoning here, § 332(c)(7)(A) likewise restrains the substantive scope of the Act, and the Commission's jurisdiction, only as to aspects of local zoning authority not governed by § 332(c)(7)(B).[20]

b. For its part, CTTC relies (at 47-53) on § 332(c)(7)(B)(v). That subsection creates a cause of action in federal or state court for any person "adversely affected by any final action or failure to act by a State or local government or any instrumen-

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[20] Arlington also relies (at 32-34, 43-44) on the legislative history of § 332(c)(7), but that history is irrelevant because the statute is unambiguous on its face. *See Milner v. Department of Navy*, 131 S. Ct. 1259, 1266 (2011) (observing that, although some members of the Court "believe that clear evidence of congressional intent may illuminate ambiguous text," the Court "will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language").

tality thereof that is inconsistent with" § 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(v). It also permits a person "adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) [to] petition the Commission for relief." *Id.* CTTC argues that this language "specifically state[s] what power and jurisdiction was enumerated to the FCC," and by implication excludes the jurisdiction that the FCC exercised to interpret and enforce § 332(c)(7)(B). This argument is wrong for two reasons.

First, § 332(c)(7)(B)(v) contains affirmative grants of jurisdiction to courts and to the FCC. Like § 332(c)(7)(A), it contains no language restricting the FCC's jurisdiction, which Congress could easily have inserted had it meant to achieve that effect. *See supra* p. 28. Moreover, even if § 332(c)(7)(B)(v) could be interpreted to remove jurisdiction from the FCC in order to convey it to the courts, it does not (and could not) convey to the courts the jurisdiction to issue general guidance in the form of a declaratory ruling, like the one under review here. Instead, § 332(c)(7)(B)(v) deals only with procedures for the judicial resolution of disputes about particular "act[s]," "final action[s]," or "failure[s] to act" – the types of disputes that make up concrete Article III cases and controversies. The order under review was not addressed to any such particular dispute, and no Article III court would have had jurisdiction (exclusive or otherwise) to issue a similar ruling.

Second, CTTC's argument, like Arlington's, is foreclosed by *Iowa Utilities Board*. In that case, this Court held that, although "the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to

rural [local exchange carriers]," these assignments did "not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments." 525 U.S. at 385 (citation omitted). In this case, Congress's decision to give the courts the job of hearing complaints against local authorities likewise does not logically preclude the FCC from providing guidance to the courts and to parties whose disputes have not yet ripened for judicial decision.

2. Principles of Federalism Do Not Restrict the Commission's Jurisdiction over Substantive Provisions of the Communications Act

Petitioners also contend that principles of federalism support their position that the Commission lacked jurisdiction. *See* Arlington Br. 35-40; *see also* IMLA Br. 35-43. Arlington, for example, argues that "the FCC's jurisdictional claim would displace State and local authority over local land use processes" and that, "[g]iven th[is] intrusion on traditional local authority, FCC jurisdiction cannot be presumed from ambiguous statutory language." Arlington Br. 38. This argument fails at the threshold because it rests on the premise that the statutory grant of jurisdiction to the Commission is ambiguous. For the reasons given in Parts II.A and II.B.1 above, it is not. Even if there were a presumption in favor of the localities, the clear text of the statute would be enough to overcome it.

In any event, *Iowa Utilities Board* expressly rejected the argument that, once Congress has brought formerly local matters within the substantive scope of the Communications Act, there is any federalism-based presumption against Commission jurisdiction. One of the dissents in that case had argued that the

"presumption against the pre-emption of state police power regulations" should lead the Court to conclude that the Commission lacked the jurisdiction that it had sought to exercise. 525 U.S. at 378 n.6 (internal quotation marks omitted). The Court dismissed this concern, responding:

> [T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

Id.[21] The same observations apply with equal force here. In order to promote the faster growth of a competitive national wireless network, Congress has undisputedly imposed federal restrictions on local governments and has limited the traditional authority they had previously exercised over decisions about land use. The means that Congress chose to do so was to subject those local governments to the 1996 Act – and thus, under § 201(b) and *Iowa Utiltiies Board*, to the Commission's general jurisdiction. That is enough to show that "Congress would expect

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[21] *See also Iowa Utils. Bd.*, 525 U.S. at 378 n.6 ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail.")

the [Commission] to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *Mead*, 533 U.S. at 229, with regard to § 332(c)(7)(B).

That the Commission has jurisdiction to interpret and enforce § 332(c)(7)(B) does not mean that concerns of local autonomy become irrelevant. Instead, it means that those concerns are now among the "manifestly competing interests" among which the Commission must make a "reasonable accommodation," subject to deferential judicial review. *Chevron*, 467 U.S. at 865. That balancing of interests goes to the merits of the Commission's decision, rather than to its jurisdiction to make a decision. The Commission did in fact strike such a balance, and the court of appeals held that the balance the Commission struck was reasonable. *See* Pet. App. 63a-67a. This Court has not granted certiorari to review that (manifestly correct) holding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 19, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 11-1545 & 11-1547

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; ET AL.,
Respondents.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, PROFESSORS JONATHAN H. ADLER, ROEDERICK M. HILLS, JR., JAMES HUFFMAN, DANIEL A. LYONS, ANDREW P. MORRISS, NATHAN A. SALES, AND DAVID SCHOENBROD IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government and seven law professors who teach and write about administrative law, constitutional law, and related subjects.

This case is important to the *amici* because they believe the Fifth Circuit's extension of *Chevron* deference to an independent federal agency's interpretation of its own jurisdiction-controlling statutory provisions is inconsistent with decades of this Court's administrative law precedents, the constitutional principles governing the construction of statutory delegations of power to federal agencies, and the system of checks and balances established by the Constitution.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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The views expressed herein are those of the *amici* and do not necessarily reflect the views of the *amici* law professors' employers or any other group or organization with which they may be affiliated.

SUMMARY OF ARGUMENT

The Court has never decided whether a federal agency's interpretation of its own jurisdiction-controlling statutory provisions should be eligible for deference under the two-step inquiry articulated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but the foundation for the answer was made explicit in *United States v. Mead Corp.*, 533 U.S. 218 (2001). There, the Court held that an agency's interpretation of a statute is eligible for deference under *Chevron* only "when it appears that Congress delegated authority to the agency generally to make rules [about the meaning of that statute] carrying the force of law." *Id.* at 226-27.

Mead teaches that there must be a clear sign of congressional intent to delegate authority to interpret a statutory provision *before* a court gives

"controlling weight" (that is, "*Chevron* deference") to an agency's reasonable interpretation of ambiguities in that provision. *Mead*'s teaching comports with (1) Article I of the Constitution, which vests all legislative power in the Congress, (2) the rule that federal agencies have no inherent powers but only delegated ones, and (3) the principles directing that statutes should be construed to avoid difficult constitutional questions and in light of the modest constraints of the nondelegation doctrine. It also comports with the Administrative Procedure Act and decades of this Court's precedents. And it limits the potential for aggrandizement by federal agencies, while ensuring that Congress is able to delegate authority to an agency to interpret statutory ambiguities when necessary and proper.

Mead's implications for the particular question presented in this case are clear. A reviewing court should presume that an agency's interpretation of ambiguity in jurisdiction-controlling provisions is not eligible for *Chevron* deference. Questions of agency jurisdiction are questions of law that are for the courts to resolve in the first instance. Further, a statutory ambiguity, standing alone, does not constitute a delegation of interpretive authority to a federal agency, let alone a delegation of authority to an agency to determine the scope of its own jurisdiction.

The Fifth Circuit's decision in this case does not follow the proper analytical path. The Fifth Circuit neither looked for, nor found, a clear sign of congressional intent to delegate authority before deferring to the FCC's interpretation of the alleged ambiguity in the provisions at issue here. Standing alone, that error should lead to vacatur of the Fifth

Circuit's judgment and remand for further proceedings, consistent with *Mead* and the Court's opinion.

Affirming the Fifth Circuit's judgment and reflexively treating the FCC's interpretation of its own jurisdiction-controlling provisions as eligible for *Chevron* deference would be inconsistent with *Mead* and would establish a principle of statutory construction in direct opposition to the principles used by the Court in other cases interpreting statutes to avoid constitutional delegation problems.

Treating the jurisdictional interpretations of federal agencies as eligible for *Chevron* deference also would create a particular risk of agency aggrandizement. Just as one would not let foxes guard henhouses, courts should not presume Congress has authorized agencies to determine their own jurisdiction, for agencies will be prone to interpret ambiguities in line with agency interests. Extending eligibility for *Chevron* deference to interpretations of jurisdiction-controlling provisions also would give agencies a systematic advantage over Congress on questions of their own jurisdiction, and make it easier for Congress to shirk its responsibility to delegate power in a clear manner. None of those outcomes would be desirable or consistent with the careful allocation of power among the branches of government set forth in this Court's precedents.

The Court should adhere to *Mead*, vacate the Fifth Circuit's judgment, and remand the case so that the Fifth Circuit can make an appropriate de novo assessment of the agency's jurisdiction, without *Chevron* deference to the agency's views on that threshold matter.

ARGUMENT

I. *Chevron* Applies Only When Congress Has Delegated Interpretive Authority To An Agency.

The Court's decision in *Chevron* set forth a familiar two-step inquiry for courts to apply when evaluating agency interpretations of federal statutes. In step one, the reviewing court considers the statutory text to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the statute controls, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is "silent or ambiguous," however, the court proceeds to step two and must defer to the agency's statutory interpretation, so long as it "is based on a permissible construction of the statute." *Id.* at 843. In other words, at step two, the agency's interpretation is given "*controlling weight*" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844 (emphasis added). As the Court explained in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program."

Chevron itself concerned a relatively routine, technical controversy concerning the implementation of a complex regulatory statute. Nothing in the Court's decision purported to announce a landmark holding. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, in Administrative Law Stories 399, 402 (Peter L. Strauss ed., 2006). Perhaps because of the relatively routine and technical nature of the underlying

dispute in the *Chevron* case, the Court "was much clearer" in articulating *Chevron*'s two-step approach than it was in articulating "the rationale that accounted for it." Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 197 (2006). Over the years, this lack of clarity has led to significant doctrinal confusion, tension, and debate in this Court and the circuit courts, as well as among academics and commentators, over *Chevron*'s "legal pedigree" and how broadly to apply the two-step *Chevron* deference analysis. *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1522, 1525 (2009).

Some commentators have argued that *Chevron* is grounded in constitutional separation-of-powers principles. *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L.J. 269, 269-70 (1988); Richard J. Pierce, Jr., *Reconciling* Chevron *and* Stare Decisis, 85 Geo. L.J. 2225, 2232-34 (1997). Others have suggested that *Chevron* should be seen as a rule of federal common law. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 618-19 (1992); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 Yale J. on Reg. 327, 345-54 (2000). Still others maintain that *Chevron* deference is derived from congressional intent. *See, e.g.*, Ernest Gellhorn & Pail Verkuil, *Controlling* Chevron*-Based Delegations*, 20 Cardozo L. Rev. 989, 1007 (1999); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836-37, 872 (2001); Sunstein, Chevron

Step Zero, 92 Va. L. Rev. at 198; Daniel A. Lyons, *Tethering the Administrative State: The Case Against* Chevron *Deference For FCC Jurisdictional Claims*, 36 J. Corp. L. 823, 830-31 (2011).

Indeed, the conflict that presently exists among lower courts on the very question presented in this case reflects this fundamental doctrinal confusion, tension, and debate over *Chevron*'s rationale and scope.[2]

While the Court may not have been as clear as it could have been about the doctrinal pedigree of its two-step approach in *Chevron* itself, the Court has been relatively consistent in maintaining that congressional delegation is the basis for according controlling weight to an agency's reasonable interpretation of an ambiguous statute. In *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), the Court explained that "[a] precondition to deference

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[2] *Compare N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999); *Durable Mfg. Co. v. United States Dep't of Labor*, 578 F.3d 497, 501 (7th Cir. 2009); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998) (reviewing an agency's determination of its own statutory jurisdiction without applying *Chevron*'s two-step analysis), *with NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 355 (3d Cir. 2001); *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988); *Lyon County Bd. of Comm'rs v. EPA*, 406 F.3d 981, 983 (8th Cir. 2005); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-1146 (10th Cir. 2010) (applying *Chevron*'s two-step analysis to questions of an agency's statutory jurisdiction).

under *Chevron* is a congressional delegation of administrative authority." Likewise in *Dunn v. Commodity Futures Trading Comm'n*, 529 U.S. 465, 479 n.14 (1997), the Court described *Chevron* deference as "aris[ing] out of background presumptions of congressional intent" (citing *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 740-41 (1996)). And in *Christensen v. Harris County*, 519 U.S. 576 (2000), a majority of the Court held that (i) Congress can only be said to have impliedly delegated the power to interpret ambiguous statutory language when it has granted an agency power to take actions that bind the public with the "force of law" and (ii) other agency interpretations should only receive a lesser form of deference (*Skidmore* deference) or no deference at all. *Id.* at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

United States v. Mead Corp. made it even clearer that eligibility for *Chevron* deference depends on a delegation of interpretive authority to a federal agency. In *Mead*, the Court held that the U.S. Customs Service's tariff classification rulings were not entitled to *Chevron* deference, and its decision makes it clear that "congressional intent is the touchstone" for determining whether an agency's interpretation of a statute may be eligible for deference under *Chevron*'s two-step approach. Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1526; *see also* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 812 (2002) ("At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent."). As the Court put it then, *Chevron* applies "when it appears that Congress

delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. The Court further explained that while there are many ways Congress may demonstrate its intention to delegate interpretive authority (including, as in *Mead* itself, by granting authority to engage in notice-and-comment rulemaking), an agency's decision is not eligible for *Chevron* deference without that demonstration of Congress's intent. *Id.* at 227.

Mead's explicit grounding of *Chevron* deference in Congress's intent to delegate authority to interpret ambiguity in a statute has several important implications for the doctrinal debates about *Chevron*'s legal pedigree and how broadly to apply the *Chevron* deference analysis.

First, by making it clear that eligibility for *Chevron* deference depends on Congress's intent, *Mead* also makes it clear that *Chevron* deference does not arise directly from constitutional separation-of-powers principles. Judicial deference under *Chevron* is possible and appropriate only where there is reason to think that Congress has delegated authority to the agency to fill in gaps and resolve ambiguities in a particular statute, and it always is subject to congressional control and revision. In other words, "*Chevron* deference should apply only where Congress would want [it] to apply." *See* Merrill & Hickman, Chevron*'s Domain*, at 836-37. *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2130 (2002) ("Congress could by statute eliminate the *Chevron* doctrine.").

Second, *Mead* makes it clear that there must be a judicial inquiry into whether Congress intended to delegate authority to an agency to interpret a statutory ambiguity before a court extends *Chevron* deference to the agency's reasonable interpretation of that ambiguity. Merrill & Hickman, Chevron's *Domain*, 89 Geo. L.J. at 836-37; Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. at 208. If there is a clear sign of Congress's intent to delegate interpretive authority, the interpretation is eligible for deference under *Chevron*'s two-step inquiry. If not, the agency's interpretation is not eligible for *Chevron* deference, and the court should apply a lesser form of deference or no deference at all. Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1526.

Third, *Mead* confirms that mere ambiguity in a statute is not sufficient to establish that Congress intended to delegate to an agency interpretive authority over that ambiguity. *See also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved."). As lower courts have recognized, ambiguity is necessary, but not sufficient, to establish a delegation of authority and allow for *Chevron* deference. *See Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) ("Mere ambiguity in a statute is not evidence of congressional delegation of authority"); *Atlantic City v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (same); *American Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (same); *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007).

After *Mead*, courts must look for a clear sign that Congress delegated authority to the agency to resolve

an ambiguity in a statute, relying on the traditional tools of statutory interpretation. A clear sign can be manifest in the text of the statute, in the agency's power to engage in notice-and-comment rulemaking, or in other ways. However, there must be an *affirmative* reason to conclude that Congress intended the agency to have interpretive authority and courts to give controlling weight to the agency's reasonable interpretation. As Professor Adrian Vermeule, a *Mead* critic, has written:

> Rather than taking ambiguity to signify delegation, *Mead* establishes that the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked.

Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 348 (2003), *quoted in* Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1528.

Fourth, *Mead*'s focus on congressional intent also suggests that certain types of statutes are less likely to be subject to the *Chevron* framework. *Cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("In extraordinary cases, ... there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

For example, the Court frequently has suggested that Congress would expect a reviewing court to give controlling weight to an agency's reasonable

interpretation of an ambiguity in a statute where (1) the agency has specialized knowledge or expertise in the technical subject matter of a statute—knowledge and expertise that gives the agency an institutional advantage over a reviewing court in resolving statutory questions in accord with Congress's policy objectives and intent, (2) deference to the agency would increase political control and accountability, or (3) the agency's range of reasonable interpretive choices are tethered to express statutory mandates that serve to limit the danger of agency self-dealing and aggrandizement.[3] Conversely, the Court has been reluctant to give controlling weight to an agency's interpretation of an ambiguity in a statute where the agency lacks expertise or competence relative to a court or where deference arguably would decrease political accountability and increase the dangers of agency self-dealing and aggrandizement.[4]

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[3] *See Chevron*, 467 U.S. at 865 (regulations eligible for deference where agency indisputably had authority to interpret statutory ambiguities and was an "expert[] in the field," and part of a "political branch of Government."); *see also City of New York v. FCC*, 486 U.S. 57, 67 (1988) (regulations deemed eligible for deference where the statute "grants the [FCC] the power to 'establish technical standards'" (citation omitted)); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board's order "on an issue that implicates its expertise in labor relations" was eligible for deference where the Court previously determined "that the task of defining the scope" of the statute was for agency); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969) (upholding regulations where Congress "ratified" agency construction "with positive legislation").

[4] *See, e.g., Gonzales*, 546 U.S. at 243 (evaluating an executive officer's claim of delegated interpretive authority de novo; and

II. Courts Should Presume *Chevron* Does Not Apply To An Agency's Interpretation Of Its Own Jurisdiction-Controlling Statutory Provisions.

A federal agency's interpretation of its own jurisdiction-controlling statutory provisions should not be eligible for *Chevron* deference unless the reviewing court (1) conducts a de novo review of the statutory scheme and (2) finds an affirmative reason to conclude that Congress intended the agency to have authority to make interpretations of the jurisdiction-controlling provisions that carry the force of law.

A. The Court Has Never Held That An Agency's Interpretation Of Jurisdiction-Controlling Provisions Is Eligible For *Chevron* Deference.

Whenever an issue has arisen regarding an agency's authority to issue a binding interpretation of a jurisdiction-controlling provisions, the Court has reviewed the agency's authority de novo—assessing whether Congress has delegated power to make rules with the force of law. The Court never has held an agency's interpretation of its own jurisdiction-controlling provisions to be eligible for *Chevron* deference. There is no reason to reverse course.

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rejecting the claimed authority where, among other things, the claimed authority (1) did not comport with the text of the statutory delegation provision; (2) would have an "extraordinary" effect on the balance of power among branches of the federal government and between the federal government and the states; and (3) did not align with any special "expertise" of the officer.

Two years after *Chevron*, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court made remarks that *implied* that an agency's views on the scope of its jurisdiction could be eligible for deference from the judiciary under *Chevron*. However, a close reading of *Schor* shows that the Court reviewed and decided the jurisdiction of the CFTC de novo, based on the "face of the [Commodity Exchange Act]," its "unambiguous[]" legislative history, and "abundant evidence" of what Congress "plainly intended." *Id.* at 841-43, 847. It was only *after* the Court had conducted its own independent assessment of the jurisdiction-controlling statutory provisions that the Court made passing remarks about the CFTC's "long-held position" on the meaning of the provisions. *Id.* at 845 (describing the CFTC position as reasonable and worthy of considerable weight under *Chevron*). And, even those passing remarks were prefaced by what appears to be an independent judicial determination that the CFTC had some sort of (unspecified) "delegated authority" under the Act to make rules interpreting the jurisdiction-controlling provisions. *Id.* In any event, in light of the Court's preceding independent assessment of the CFTC's jurisdiction under the Act, the Court's passing remarks about the CFTC's position on the jurisdictional issue should be seen for what they are—*dicta* from the beginning of the *Chevron* era.

Two years after *Schor*, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), Justices Scalia and Brennan wrote dueling opinions that did address the question of whether a federal agency's interpretation of its own jurisdiction-controlling provisions should be eligible

for *Chevron* deference. *Id.* at 377-84 (Scalia, J., concurring in judgment), 384-91 (Brennan, J. dissenting). Although the competing considerations of the two justices have been echoed repeatedly by jurists and academics, they were not addressed in the Court's primary opinion. *Id.* at 367-70 (Stevens, J., for the Court) (making no reference to *Chevron*). Furthermore, since *Mississippi Power*, the Court has sidestepped numerous opportunities to illuminate the extent to which jurisdictional questions ought to be analyzed under the *Chevron* framework, typically by finding the meaning of jurisdiction-controlling statutory provisions to be plain and unambiguous.[5]

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[5] *See Mississippi Power*, 487 U.S. at 370-77 (Stevens, J., for the Court) (upholding the agency's jurisdiction without citing *Chevron*); *Dole v. United Steelworkers of America*, 494 U.S. 26, 42-43 (1990) (holding that Congress clearly denied the OMB jurisdiction to review disclosure rules under the Paperwork Reductions Act); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994) (striking down FCC's regulation that would eliminate tariff filings for most interexchange telephones); *Brown & Williamson*, 529 U.S. at 159 (holding that Congress clearly denied the FDA jurisdiction to regulate tobacco); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (sidestepping FCC jurisdiction issues); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the Clean Air Act unambiguously conferred jurisdiction on the EPA to regulate greenhouse gases).

B. An Agency's Interpretation Of Jurisdiction-Controlling Provisions Should Not Be Eligible For *Chevron* Deference Unless A Court Finds A Clear Sign Congress Vested The Agency With Authority To Interpret Ambiguities In Those Provisions.

The delegation principle implicit in *Chevron* and explicit in *Adams Fruit*, *Dunn*, *Christensen*, and *Mead* provides a solid foundation for the right answer to the question presented in this case. Simply put, an agency's interpretation of its own jurisdiction-controlling provisions should *not* be eligible for *Chevron* deference, unless a court finds a clear sign of congressional intent to delegate authority to the agency to determine, in a reasonable way, the meaning of ambiguity in the jurisdiction-controlling provisions. Merrill & Hickman, Chevron's *Domain*, 89 Geo. L.J. at 836-37; Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1528-32; Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 831-32.

Furthermore, the clear sign that a court needs cannot be established by mere ambiguity in the jurisdiction-controlling provisions themselves. There must be an *affirmative* reason for the reviewing court to conclude that Congress intended or expected the agency to have interpretive authority. Merrill & Hickman, Chevron's *Domain*, 89 Geo. L.J. at 836-37; Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1528-32; Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 831-32. That a statute fails to resolve a jurisdictional question is not, in itself, evidence of Congressional intent to delegate authority to an agency.

There should be, in other words, a strong presumption *against* treating an agency's interpretation of jurisdiction-controlling statutes as eligible for *Chevron* deference—a presumption that can be rebutted only by a de novo statutory analysis that shows that Congress affirmatively entrusted the agency with such authority. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1788 (2012) ("Rather than defer to executive assertions of power, courts should presume that Congress has not intended to delegate power unless it has done so with clarity.").

C. A Strong Presumption Against *Chevron* Deference In Cases Of Jurisdiction-Controlling Provisions Comports With Constitutional Principles Requiring That A Delegation To An Agency Be Guided By An Intelligible Principle.

A strong presumption against extending *Chevron* deference in cases involving agency interpretations of jurisdiction-controlling provisions would be consistent with (1) Article I of the Constitution, which vests all legislative power in the Congress; (2) settled principles of constitutional law that make it clear that federal agencies have no inherent powers but only delegated ones; and (3) the rules providing that statutes should be construed to avoid difficult constitutional questions and in light of the modest constraints of the nondelegation doctrine. U.S. Const. art. I, § 1; *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant

of such power by the Congress and subject to limitations that body imposes.").

It is "axiomatic" that a federal agency has no inherent power to act unless and until Congress delegates power to it through a statute. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act... unless and until Congress confers power upon it."). Furthermore, consistent with Article I, Congress cannot give an agency the power to define its own political or public policy mission; Congress must define the agency's power and authority and give the agency an "intelligible principle" to guide the agency's efforts to interpret, implement, and enforce the statute.

The nondelegation doctrine ensures that "important choices of social policy are made by Congress, the branch of our Government most responsible to the popular will." *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). The doctrine prevents Congress from forsaking its duties and prevents agencies from arrogating undelegated powers. *Loving v. United States*, 517 U.S. 748, 757 (1996). Simply put, the doctrine fosters democratic accountability and safeguards liberty.

While this Court has been reluctant to apply the nondelegation doctrine directly to strike down statutes that delegate power to agencies, *see Mistretta v. United States*, 488 U.S. 361, 372 (1989), it consistently has reaffirmed the bedrock constitutional principle that agencies have only those powers delegated to them by Congress. The Court thus has interpreted statutes so as to avoid potential

nondelegation doctrine problems, *see, e.g.*, *Industrial Union Dep't*, 448 U.S. at 646; *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974), and has required an agency to construe a statute so as to avoid nondelegation doctrine concerns. *See AT&T Corp. v. Iowa Public Utilities Bd.*, 525 U.S. 366, 388-89 (1999).[6] This approach ensures that federal agencies only exercise those powers actually delegated by Congress. *See* Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. at 1786-87 ("Armed with the understanding that the legislative branch, not the executive, makes law, courts should interpret statutes narrowly to ensure that any delegation is the genuine intention of Congress, and not an instance of executive overreach.").

The question of whether Congress has delegated authority to an agency to decide the meaning of jurisdiction-controlling statutory provisions logically and chronologically precedes the question of whether the agency's exercise of that power is entitled to deference under *Chevron*. *See NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987) (*Chevron* review of agency interpretations of statutes applies only to regulations "promulgated pursuant to congressional authority"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) (rejecting *Chevron* deference where the statute "is not administered by any agency but by the courts"); *cf. Bureau of Alcohol, Tobacco and*

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[6] *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315-17 (2000).

Firearms v. FLRA, 464 U.S. 89, 97 (1983) (refusing to sanction "'unauthorized assumption by an agency of major policy decisions'" (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

A holding in this case that recognizes this reality and establishes a strong presumption against extending *Chevron* deference to an agency's interpretation of jurisdiction-controlling provisions would advance the ultimate concerns of the nondelegation doctrine and avoid potential constitutional problems associated with giving agencies interpretive authority to define their own jurisdiction by presumption or implication.

D. A Strong Presumption Against *Chevron* Deference Also Comports With The Administrative Procedure Act And Decades Of Precedents.

The text of the Administrative Procedure Act (APA) and decades of administrative law precedents from this Court further reinforce the conclusion that an agency's interpretation of jurisdiction-controlling statutory provisions should *not* be eligible for *Chevron* deference unless a court finds a delegation by Congress to the agency of authority to issue reasonable interpretations of ambiguities in the jurisdiction-controlling provisions.

In the APA, Congress directed that the courts should decide "all relevant questions of law." 5 U.S.C. § 706. As Justice Scalia noted in his dissent in *Mead*, "[t]here is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite." *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). Yet, there is no genuine conflict between § 706 and *Chevron* in this case or any other,

agency jurisdiction and other legal questions and limitations on agency power." Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1537. This Court and lower federal courts routinely distinguish between jurisdictional and nonjurisdictional questions, and this inquiry presents no greater challenge than those addressed by federal courts all the time. *Id.* at 1557-60; Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 Wm. & Mary L. Rev. 1463, 1522-24 (2000).

Requiring agencies to identify a statutory basis for any jurisdictional claim will resolve many cases. Courts may also consider whether a given assertion of jurisdiction is novel for an agency or strays from its "core regulatory assignment." Gellhorn & Verkuil, *Controlling* Chevron*-based Delegations*, 20 Cardozo L. Rev. at 1009, 1011; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1130 (2008) (distinguishing between "wholesale" and "retail" applications of a statute). In all instances, however, the existence of agency jurisdiction is a necessary predicate for *Chevron* deference. This distinction between jurisdictional and nonjurisdictional questions should be maintained and re-affirmed when this case is resolved.

E. A Strong Presumption Against *Chevron* Deference Would Limit Agency Aggrandizement, While Ensuring That Congress Can Enact A Statute Making The Agency The Primary Interpreter Of Its Own Jurisdiction, If And When Congress Wishes To Do So.

As the Court recognized in *Brown & Williamson*, 529 U.S. at 159, in "extraordinary" cases, there is "reason to hesitate" before concluding that Congress intended to entrust an agency with primary responsibility for interpreting ambiguities in federal statutes or expected a court to give controlling weight to an agency's views.

By any fair measure, an agency's interpretation of jurisdiction-controlling provisions presents an "extraordinary" case, requiring a careful analysis of the natural and legitimate expectations of Congress both in general and in a particular case. This is so because an agency's interpretation of jurisdiction-controlling provisions poses a special risk of agency self-dealing or aggrandizement: a risk that the agency will exercise a power Congress did not intend or expect it to have or that it will extend its power more broadly than Congress envisioned.

Extending *Chevron* deference to agency to interpretations of jurisdiction-controlling provisions contravenes a fundamental principle within the Anglo-American legal tradition. *See, e.g.*, 1 William Blackstone, Commentaries 91 ("if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is

unreasonable that any man should determine his own quarrel."); The Federalist No. 10 (James Madison) (C. Rossiter ed. 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); The Federalist No. 80 (Alexander Hamilton) (C. Rossiter ed. 1961) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."). The Framers of the Constitution were acutely aware of the tendency of individuals to favor their own interest. Indeed, this was among the central problems the Constitution's structure of separated powers is designed to solve. *See* The Federalist, No. 51 (James Madison) (C. Rossiter ed. 1961).

This principle, that "foxes should not guard henhouses," is among those upon which judicial review of agency action is based. *See* Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 889 (2008); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 446 (1989) ("The basic case for judicial review depends upon the proposition that foxes should not guard henhouses."). Agency officials are no less prone to the temptation to interpret ambiguities in light of their own self-interest, however measured. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 208-11 (2004) (discussing agency self-interest). Judicial review of agency action helps ensure that agencies do not engage in self-dealing or aggrandizement.

Even before *Chevron*, courts were wary of allowing agencies to determine the scope of their own

power. For example, in *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944), the Court held that the "[d]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." Likewise, in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), the Court made it clear that "[an] agency may not finally decide the limits of its statutory power[;] [t]hat is a judicial function." The Court did not abandon such concerns with *Chevron*. To the contrary, as Professors Gellhorn and Verkuil observed, the very structure of *Chevron* is attentive to the problem of agency aggrandizement in that "it requires courts to make the first determination of whether Congress answered the precise question at issue [because] agencies have no comparative advantage in reading statutes and . . . agency self-interest may cloud [an agencys] judgment." *Controlling* Chevron-*based Delegations*, 20 Cardozo L. Rev. at 1009.

Aggrandizement not only raises the risk that an agency might wield excessive power but also that it might disrupt Congress's intended distribution of power. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 276-77 ("If Congress has addressed a subject, but has done so in a limited way, this fact may itself suggest that Congress has gone as far as it could, as far as the enacting coalition wished to, on the subject in question"); *see also* Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1551-53; Merrill & Hickman, Chevron's *Domain*, 89 Geo. L.J. at 912 (noting that no matter what Congress might naturally intend or expect in a case involving an ordinary statutory provision, it does "not follow" that

Congress would naturally harbor the same intent or expectation in a case that implicates the existence or scope of an agency's jurisdiction).[7]

A comparison of the institutional competencies and incentives of Congress, the courts, and agencies reinforces the conclusion that an agency's interpretation of a jurisdiction-controlling provision ordinarily should *not* be eligible for judicial deference under *Chevron*'s two-step inquiry.

Even if one believes that an agency may have some unique or valuable insight into the construction of jurisdiction-controlling provisions based on the

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[7] In a smaller but no less important set of cases, an agency may interpret a statute to disclaim jurisdiction—that is, the agency may affirmatively renounce a power arguably granted to it or conclude that an undisputedly granted power does not extend as far as it might. Jurisdiction-disclaiming interpretations pose the risk of abrogation: the possibility that an agency might fail to discharge the duty with which Congress has charged it, perhaps because of policy disagreements with the legislature or because it fears public disapproval for taking politically unpopular actions. Power-disclaiming interpretations also can pose a danger of a different sort of agency aggrandizement: agencies might focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked them with serving. *See* Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1503-07, 1548-50. Given the potential for self-interested agency action that might disrupt Congress's intended distribution of power, we see no doctrinal or practical reason to distinguish between jurisdiction-seizing and jurisdiction-denying agency interpretations. *Id.* And the Court has not drawn any such distinction either. *See, e.g.*, *Massachusetts*, 549 U.S. 497.

agency's expertise in a particular subject or its familiarity with a federal statutory scheme or program, *Mississippi Power*, 487 U.S. at 381-82 (Scalia, J., concurring in the judgment), it seems only fair to say that an agency will have much *less* institutional competence in answering questions of jurisdiction than in answering complex technical or scientific questions or making policy judgments about how best to implement a statutory regime. At the same time, the risks of aggrandizement or abrogation associated with an agency's interpretation of its own jurisdiction-controlling provisions are much greater than in any ordinary case involving complex technical or scientific questions or competing policy judgments about how best to implement a statutory regime. Agencies are, after all, "proactive" "'policy entrepreneurs.'" Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1553-54 (citation omitted); Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 836-37.

In contrast, federal courts have their own unique and valuable insights into the construction of jurisdiction-controlling provisions based on the courts' historical position and experience as the arbiters of power among the various branches of government. Furthermore, courts are inherently reactive institutions: they cannot issue advisory opinions or initiate proceedings to affirm or deny agency jurisdiction over an activity or field. Sales and Adler, *The Rest Is Silence*, 2009 U. Ill. L. Rev. at 1553-54 (citation omitted); Lyons, *Tethering the Administrative State*, 36 J. Corp. L. at 836-37.

On balance, "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own

power." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987). Indeed, it is unlikely Congress would delegate such authority at all. As then-Judge Breyer observed, "Congress is more likely to have focused upon, and answered, major questions," such as whether to confer jurisdiction to an agency, while "leaving interstitial matters," such as how delegated authority is exercised, for resolution by the agency during the "daily administration" of the statute. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

III. The Fifth Circuit Did Not Follow The Proper Path When It Automatically Treated The FCC's Interpretation Of Jurisdiction-Controlling Statutory Provisions As Eligible For *Chevron* Deference.

The Fifth Circuit's decision in this case does not follow the proper analytical path. That court neither sought nor found a clear sign of congressional intent to delegate authority to the FCC to interpret ambiguity in the agency's jurisdiction-controlling provisions *before* deeming the FCC's interpretation of those provisions eligible for *Chevron* deference. Standing alone, that error should lead to vacatur of the Fifth Circuit's judgment and remand for further proceedings, consistent with *Mead* and the Court's opinion.

Affirming the Fifth Circuit's judgment and treating the federal agency's interpretation of its own jurisdiction-controlling provisions as eligible for *Chevron* deference, without requiring an independent search by a court for a clear sign of Congress's intent to vest the agency with the power to make a reasonable ruling on that issue, would be a

mistake. It would be inconsistent with *Mead* and would establish a principle of statutory construction that is in direct opposition to the principles used by the Court in other cases interpreting statutes to avoid constitutional nondelegation problems. It would create a serious risk of self-dealing and aggrandizement by federal agencies, especially by independent federal agencies that are even further removed from political control and accountability than agencies under presidential administration. It would give agencies a systematic advantage over Congress on jurisdictional questions. And it would make it easier for Congress to shirk its responsibilities to delegate power clearly. None of those outcomes would be desirable or consistent with the balance of power among Congress, courts, and agencies struck in past cases.

The Court should adhere to *Mead*, vacate the Fifth Circuit's judgment, and remand the case so that the Fifth Circuit can make an appropriate assessment of whether Congress intended to entrust the FCC with the power to interpret the jurisdiction-controlling provisions at issue and, if Congress did not, to make its own determination of the agency's jurisdiction, without *Chevron* deference to the agency's views on those threshold jurisdictional matters.

CONCLUSION

For these reasons, and those set forth by the Petitioners, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

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Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICI CURIAE BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a court should apply *Chevron* to review an agency's determination of its own jurisdiction.

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INTEREST OF *AMICI CURIAE* [1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 17,500 members are dedicated to the sound management of government financial resources.

The National Association of Regulatory Utility Commissioners (NARUC), a quasi-governmental nonprofit organization founded in 1889, represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders. The United States Congress, in the Federal Communication Commission's authorizing legislation, assigned specific duties to and included specific reservations of existing authority of NARUC members. Congress has also consistently recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions. *See, e.g.*, 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); *see also* 47 U.S.C. § 254 (1996). Both federal courts and numerous federal administrative agencies have also recognized NARUC's representative role.

All state and local governments have a vital interest in the scope of federal regulatory authority. Often an expansion of federal authority means a restriction of state and local authority. If courts are required to defer to any reasonable federal agency interpretation of its own jurisdiction, the scope of federal authority likely will expand—perhaps quite dramatically—and state and local authority will recede. It has long been understood that courts, exercising independent judgment, play a vital role in ensuring that federal administrative agencies do not overstep the bounds of their delegated authority. *Amici* urge this Court to reaffirm that important judicial role in this case, and in so doing preserve the protections that state and local governments have enjoyed against administrative overreach.

SUMMARY OF ARGUMENT

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), addressed the question of how courts should review "an agency's construction of the statute which it administers." *Id.* at 842. The Court concluded that when a statute is "silent or ambiguous with respect to the specific issue," a reviewing court should defer to the agency's reasonable interpretation, even if it is not the one the court would have reached in the exercise of independent judgment. *Id.* at 843 n.11. The question in this case is whether the rule of deference prescribed by *Chevron* applies to an agency's determination of the scope of its own jurisdiction.

The structure of American government and the traditions that have grown up around it instruct that the answer to this question must be "no." Agencies are creatures of law and can exercise only the powers

delegated to them by law. They have no inherent authority to define the scope of their own authority. Congress has long provided for judicial review of agency action, in significant part to provide a check on agencies that reach beyond the scope of their authority. This function is specifically prescribed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), which directs courts to set aside agency action "in excess of statutory jurisdiction." A practice of deferring to agency interpretations of their own jurisdiction would eviscerate this vital check on agency power, one which is necessary to preserve the basic structure of our government.

The exercise of independent judicial judgment about the scope of agency authority is especially important in cases, such as this one, where an expansion of agency power comes at the expense of state and local governments. The Constitution gives the federal government only enumerated powers, and the Tenth Amendment specifically reserves all other powers to the states and the people. This background understanding is often important in interpreting gaps and silences that inevitably appear in federal statutes delegating power to administrative agencies. If every gap, silence, or ambiguity about the scope of an agency's authority is given over to the agency to resolve through plausible interpretation, the result is likely to be that the agency often will be able to trump state authority, through the preemptive force of the Supremacy Clause, whether or not this was contemplated by Congress when it enacted the statute in question. Judges, because of their diverse experience, training, and independence, are likely to be more sensitive to the broader tradition of American federalism that should properly inform the way

gaps and silences are filled when the question is one of agency jurisdiction.

The question in this case is not a matter of limiting or cutting back on the deference prescribed by *Chevron*. A careful reading of *Chevron* and the many cases that follow reveals that this Court presupposed the review it described would apply only where an agency interprets a statute it is "charged with administering." *See Chevron*, 467 U.S. at 844, 865. In other words, *Chevron*-style deference applies only when the agency has jurisdiction over the issue; to be "charged with administering" a question is to have administrative authority over it. The underlying theory of *Chevron*—that Congress, by delegating authority to an agency, intends the agency to have primary interpretational authority over issues that implicate contested policy questions—also presupposes that the interpretational question is within the agency's jurisdiction. Congress does not give agencies a blank check to make policy wherever they please; it delegates power to particular agencies within prescribed limits. It would make no sense to say Congress delegated power to an agency to determine whether it has delegated power. A court must be satisfied that the agency is acting within the scope of its delegated power before it turns to *Chevron*.

Two counter-arguments have been prominently advanced in favor of using the *Chevron* framework to resolve questions of agency jurisdiction. The first is that it is not possible to maintain a principled distinction between questions that are "jurisdictional" and other questions of statutory interpretation. But courts apply this distinction all the time, for example in determining whether a federal district court has subject matter jurisdiction or in asking whether

Congress has acted within the scope of its enumerated powers. Courts will be assisted by the parties in identifying questions that are jurisdictional, since complaints about an agency exceeding the scope of its jurisdiction likely will arise only when an agency is seeking to expand (or possibly contract) the types of issues it regulates. Certainly the Fifth Circuit, in the decision under review, had no hesitation about characterizing the issue as jurisdictional. Admittedly, the distinction between jurisdictional and other legal questions is susceptible to manipulation, but no more so than the distinctions already present in the *Chevron* doctrine between statutes that are "clear" and those that are "ambiguous," or the distinction between interpretations that are "reasonable" and those that are "unreasonable."

A second counter-argument is that courts have adequate authority to police agency attempts to exceed the scope of their jurisdiction under step one of the *Chevron* doctrine. This Court has used step one of *Chevron* on occasion to resolve questions identified as jurisdictional. *See, e.g.*, *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). But there are costs to doing so. One is that gaps, ambiguities, and silences in statutes about the scope of an agency's jurisdiction must often be resolved by adverting to general principles of American government, like federalism, and longstanding traditions about the allocation of governmental power. Courts are more likely to be sensitive to these variables than agencies. Another is that expanding the inquiry under *Chevron* step one to include wide-ranging considerations of constitutional law, statutory structure, and the history of a particular type of regulation threatens to sap *Chevron* of its advantages as a rule-like structure for determining

the respective role of courts and agencies. It is far better for courts to exercise independent judgment assuring that the agencies are acting within the scope of their authority before turning to the two-step *Chevron* inquiry.

ARGUMENT

I. Constitutional Structure and Traditions of American Government Require that Courts Exercise Independent Judgment in Determining the Scope of Agency Jurisdiction

Two propositions about the structure of American government resolve the question presented in this case. First, "[a]n agency may not confer power upon itself." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). Whatever power agencies have to regulate is derived solely from delegations of authority from Congress. Second, federal courts have been directed to review agency action, in significant part to ensure that agencies keep within the boundaries of their lawfully delegated authority. Together, these propositions mean that courts must exercise independent judgment to assure that agencies are acting within the jurisdiction assigned to them by Congress. Affording *Chevron* deference to agency interpretations of the scope of their own jurisdiction would effectively allow agencies to confer power on themselves contrary to the constitutional design.

As to the first proposition, the Constitution makes clear that administrative bodies possess no inherent authority to act with the force of law. The first substantive clause of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States...." U.S. CONST. art. I,

§ 1. The President is vested with certain powers in Article II, but the power to create departments or agencies with the power to act with the force of law is not among them. U.S. CONST. art. II. The courts are vested with certain powers in Article III, but again, the power to create tribunals inferior to the Supreme Court, or to vest them with the power to act with the force of law is not among them. U.S. CONST. art. III, § 1. Instead, the Constitution provides, in the Necessary and Proper Clause, that *Congress* is given the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the enumerated legislative powers of Article I, as well as "*all other Powers vested by this Constitution in the Government of the United States*, or in any Department or officer thereof." U.S. CONST. art. I, § 1, cl. 18 (emphasis added).

The Constitution therefore makes clear that the power to create any governmental department or officer, other than the constitutional offices mentioned in the Constitution, is given exclusively to Congress. And it makes clear that the power to give these departments and officers authority to act with the force of law, when this is necessary and proper to carry out the various powers vested in the federal government by the Constitution, is given exclusively to Congress.

The understanding that administrative bodies have no inherent authority to act with the force of law is a bedrock principle of American separation of powers. The principle has never been doubted. *See* THE FEDERALIST NO. 69, at 361 (Alexander Hamilton) (noting that the President, unlike the King of England, has no inherent authority to prescribe "rules concerning the commerce or currency of the

nation"). This was the principle enforced in the Steel Seizure Case, where the Court held that the President had no inherent authority to seize steel mills, even if he or she deemed it necessary to maintain the supply of material for the armed forces in time of war. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 529, 585 (1952).

This principle has been recognized repeatedly in decisions by this Court. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 161 (citations omitted) ("no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations that body imposes."); *Interstate Commerce Commission v. Cincinnati, New Orleans, & Texas Pacific Railway Co.*, 167 U.S. 479, 505 (1897) (Interstate Commerce Commission lacked authority to prescribe rates for the future since this power had not been delegated by Congress); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("The Executive . . . in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art. I, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute....").

If administrative bodies have no power to act outside the scope of the authority delegated to them by Congress, how is this principle to be enforced? Congress may police administrative exercises of authority by conducting oversight hearings, making appropriations decisions, and adopting clarifications of existing agency authority. But it is difficult for Congress, given its limited membership and the many demands on its time, to engage in a systematic review of administrative behavior to ensure compliance with the limits on agency authority. Thus, Congress has long provided, as a further and more efficacious check to assure that administrative action remains within the confines of delegated authority, broad rights allowing judicial review of agency action.

The most notable of such rights of review, of course, is that established by the Administrative Procedure Act (APA). Congress no doubt envisioned the review provisions of the APA as providing a check on agencies that might take action outside the scope of their delegated authority. Section 706 provides expressly that "The reviewing court shall—...(2) hold unlawful and set aside agency action, findings, and conclusions found to be—...(C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right*...." 5 U.S.C. § 706(2)(C) (emphasis added).

Note the care with which Congress expressed its understanding that courts should enforce limits on delegated agency authority, utilizing a variety of alternative expressions to convey this idea: in excess of jurisdiction, in excess of authority, in excess of limitations, or short of statutory right. Moreover, the directive to courts to review agency action for compliance with the scope of delegated authority is separate

and distinct from the directive to determine whether the agency action is "not in accordance with law." 5 U.S.C. § 706(2)(A). This clearly indicates that Congress recognized a distinction between agency action that is *ultra vires* and agency action that is otherwise inconsistent with the law. A practice of deferring to agency determinations of the scope of their own authority would thus fly in the face of the plain language of the APA.

Judicial review of questions of agency jurisdiction is especially important given the variety of conflicts that arise over the scope of agency authority. Agency jurisdiction can implicate the respective authority of the federal government and the states, the scope of governmental as opposed to private or market ordering, and the respective authority of two or more federal administrative agencies. Congress has the ultimate authority to set the boundaries of agency authority on all these dimensions, and courts have a duty to assure that those boundaries are maintained. As this Court has observed, "[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do." *Louisiana Public Service Commission*, 476 U.S. at 374-75.

II. Independent Judicial Determination is Especially Important When Federal Agencies Seek to Expand their Power at the Expense of State and Local Governments

State and local governments are often regulated by federal agencies and often regulate the same subject matter as federal agencies. As a result, allowing federal agencies to determine the scope of their own jurisdiction, with only deferential review by courts,

would effectively allow federal agencies to trench upon the authority of state and local governments, with little constraint or check. The issue presented by this case vividly illustrates the risk.

47 U.S.C. § 332(c)(7)(B) reflects a limited preemption of state and local authority. Specifically, as relevant to this case, the statute requires state and local governmental authorities to act upon any request for authority to construct a new wireless facility "within a reasonable period of time." That section, however, also contains an anti-preemption or savings clause:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities. 47 U.S.C. § 332(c)(7)(A).

The Commission's declaratory order in this case, which the court of appeals recognized was effectively a rule, expands the preemptive effect of § 332(c)(7)(B)(ii). This not only violates the statute's savings clause, it also means the Commission's "interpretation" cannot be afforded *Chevron* deference.

Before the Commission's order, local courts determined on a case-by-case basis whether the permitting authority acted within a reasonable period of time. *See* 47 U.S.C. § 332(c)(7)(B)(ii) (courts are to determine claims of unreasonable delay "taking into account the nature and scope of such request"). Under the Commission's order, courts must adopt a presumption that any request not acted upon within the Commission's 90- and 150-day time limits is "unreasonable." Whether this presumption changes

the burden of persuasion, or merely the burden of producing evidence (as the court of appeals thought), it necessarily restricts the scope of authority of state and local governmental permitting authorities relative to what it was before the Commission acted. Failure to act within the prescribed time frames will create a presumption of unreasonableness. This presumption will constrain local permitting authorities to comply within the times frames laid down by the Commission. The Commission would not have imposed its time frames if it did not believe they would have a constraining effect on local permitting bodies.

A decision by a federal regulatory agency to preempt—or in this case, to expand the scope of an existing statutory preemption—cannot be taken on the agency's own authority without an express delegation of such authority by Congress. This follows from the more general proposition, discussed in Section I, that agencies have no inherent authority to act with the force of law absent a delegation from Congress. When agencies seek to preempt, this conclusion is reinforced by the text of the Supremacy Clause, which makes "[t]his Constitution, and *the Laws of the United States which shall be made in Pursuance thereof*...the supreme Law of the Land." U.S. CONST. art. VI, cl. 2 (emphasis added). A statute duly enacted by Congress that expressly delegates power to preempt to an agency would fall within the terms of the Supremacy Clause. An agency order adopted under its general regulatory authority does not. This Court has recognized as much. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 384 (1986) (rejecting the FCC's contention that it could preempt a state regulation in order to "effectuate a federal policy" absent congressional authorization).

For similar reasons, agencies should not be given *Chevron*-style deference when they interpret federal statutes (or their own regulations) to have preemptive effect. The decision to displace state law through preemption implicates important questions of federalism. *See, e.g.*, *Medtronic Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (describing preemption of state common law remedies as "a serious intrusion into state sovereignty"). Indeed, from the perspective of the states, there is little difference between a judgment that state law is preempted and a judgment that state law is unconstitutional. Both types of judgments nullify otherwise duly enacted state statutes and common law rules of decision. In so doing, both type of judgments subtract from the power the states otherwise enjoy as sovereign entities.

Part of our received tradition is the understanding that the judiciary has unique competence to resolve questions of constitutional federalism. Thus, for example, this Court has declined to adopt interpretations of statutes that raise serious questions of constitutional federalism, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and has declined to defer to agency decisions that raise serious questions of constitutional federalism. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2000). Likewise, the decision to displace state law through preemption should be informed by an understanding of which areas of regulation have been delegated to the federal government, and which have been traditionally committed to the states, and when constitutional sensitivities would be irritated either by a determination of concurrent authority or of exclusive federal competence.

Agencies are specialized institutions, intensely focused on the details of the particular statutory regimes they are charged with administering. By design and tradition, they are not expected to ponder larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state and local autonomy, the value of allowing policy to vary in accordance with local conditions, or the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory v. Ashcroft*, 501 U.S. at 458-59 (summarizing the systemic benefits of federalism).

This Court's most complete discussion of the appropriate standard for reviewing agency actions said to require preemption is found in *Wyeth v. Levine*, 555 U.S. 555 (2009). There, the Court observed that an agency regulation with the force of law can preempt state law. But even in such cases, "the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 576. Where Congress has not authorized the agency "to pre-empt state law directly," and where the agency has not issued a legislative regulation that is claimed to conflict with state law, the question is what weight courts should give the agency's opinion about pre-emption. *Id.* The answer, the Court indicated, is that an agency's views should be given "some weight," *id.* (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000)), given its understanding of the statute and its ability to make "informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id.* at 577 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In no case, however, has this Court "deferred to the agency's *conclusion* that state law is pre-empted." *Id.* at 576. Rather, the weight given to the agency's views turned on the agency's "thoroughness, consistency, and persuasiveness." *Id.* at 577.

Clearly, this was not *Chevron* deference. Other recent decisions are to the same or similar effect. *See, e.g.*, *Medtronic*, 518 U.S. at 488; *Geier*, 529 U.S. at 883; *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 38-44 (2007) (Stevens, J., joined by Roberts C.J., and Scalia, J. dissenting). In no case has this Court deferred to an agency opinion that preemption is required by finding that this was "reasonable" under step two of *Chevron*. To the contrary, the common assumption has been that "the question of whether a statute is pre-emptive" is one that "must always be decided *de novo* by the courts." *Smiley v. Citicorp (S.D.), N.A.*, 517 U.S. 735, 744 (1996).

Wyeth likewise states the appropriate standard of review when an agency interprets an express preemption clause.[2] As *Chevron* teaches, when a statute is ambiguous or contains a gap, the exercise of interpretation entails a policy choice. When agencies interpret ambiguous statutes that they have been given authority to implement, the policy choice properly belongs to the agency. But when the ambiguity appears in an express preemption clause, the policy

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[2] To the extent the dissenting opinion in *Cuomo v. The Clearing House Associates, L.L.C.*, 557 U.S. 519, 555 (2009), assumes that *Chevron* applies to agency interpretations of express preemption clauses, we believe it was in error, for the reasons stated in the balance of this paragraph. In any event, the assumptions of a dissenting opinion are not controlling authority in future cases.

choice entails more far-reaching considerations of federalism.

Preemption entails not only the scope of federal agency authority, but also the displacement of state governmental authority. It eliminates the power of the states to act, often in areas where they have long been understood to exercise exclusive authority. Hence, the interpretation of an express preemption clause has a critical effect on the balance of federal and state authority. Courts are more likely to be sensitive to these larger considerations of federalism than are agencies, which may have a single-minded focus on achieving their narrow regulatory objectives. Agencies may be resentful of implicit competition from state and local governments, or may place an inordinate value on the convenience of not having to deal with different ways to solving a problem. In short, where interpretation entails contested issues of policy *about preemption*, there is every reason to believe that courts, rather than agencies, are the proper institution for resolving the interpretational question.

III. The Theory Underlying *Chevron* Deference Requires that Courts Exercise Independent Judgment in Determining the Scope of Agency Jurisdiction

The *Chevron* doctrine is not in tension with the proposition that reviewing courts must exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority. *Chevron* spoke of the need to defer to reasonable interpretations of statutory provisions rendered by those "entrusted to administer" a statutory scheme. 467 U.S. at 844. This comment clearly presupposes

that the reviewing court must satisfy itself that the statutory provision in question is one that the agency has been "entrusted" or "charged" with administering. *See Smiley*, 517 U.S. at 739. In other words, the court must make an independent determination that the agency has been given delegated statutory authority to administer the provision in controversy. This is essentially an inquiry into agency jurisdiction or scope of authority.

Chevron also justified its rule of deference by observing that "an agency to which Congress has delegated policymaking responsibilities may, *within the limits of that delegation*, properly rely on the incumbent administration's views of wise policy to inform its judgments." 467 U.S. at 865 (emphasis added). This statement expressly acknowledges that any rule of deference is limited to exercises of statutory interpretation that fall within the delegated authority of the agency, and implies that those limits will continue to be independently determined by the reviewing court.

More fundamentally, the underlying rationale of *Chevron* compels independent judicial review of the scope of an agency's delegated authority. *Chevron* indicated that courts should defer to reasonable agency interpretations of statutes because Congress, in delegating authority to an agency, impliedly intends the agency rather than the court to fill any gaps or ambiguities in the statute. 467 U.S. at 843-44. More recent decisions have confirmed that "[a] precondition to deference under *Chevron* is a delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see, e.g., National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("In

Chevron, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."). Again, this presupposes that the court must satisfy itself that Congress has delegated policy authority to an agency with respect to the statutory provision in question before the court engages in *Chevron*-type review.

The concept of implied delegation explains why *Chevron* deference is consistent with the APA, which generally instructs reviewing courts to decide "all relevant questions of law." 5 U.S.C. § 706. When Congress delegates policy authority to an agency with respect to a particular statutory provision, this can be seen as an implied instruction to courts to accept reasonable agency interpretations of that provision, at least insofar as those interpretations rest on policy judgments. In effect, the APA's general command instructing courts to exercise independent judgment in deciding questions of law is fully respected. But insofar as the court finds the provision in question is ambiguous or incomplete, it adopts the agency's reasonable interpretation because Congress has given the agency authority to make policy judgments with respect to the provision.

This reconciliation with the APA is not possible, however, when issues arise about whether the agency is acting within the scope of its delegated authority. Here there can be no finding of an "implied delegation" to the agency because the very question at issue is whether such a delegation does or does not exist. Consequently, the language of the APA instructing courts to decide "all relevant questions of law" with respect to whether the agency action is "in excess of statutory jurisdiction, authority, or

limitations, or short of statutory right," 5 U.S.C. § 706(2)(C), stands unqualified, and cannot be implemented by drawing on *Chevron*'s insight about implied delegation.

Post-*Chevron* decisions discussing the preconditions for *Chevron* deference also establish that courts must make an independent determination of whether the agency is acting within the scope of its delegated authority. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court held, as a general matter, that *Chevron* applies where Congress has delegated authority to an agency to act with the "force of law" and the agency interpretation has been rendered in an exercise of that authority. *Id.* at 226-27; *see also Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000). The principal circumstances in which these conditions will be satisfied are where an agency has been given legislative rulemaking authority and has interpreted the statute by promulgating a legislative rule, or where an agency has been given authority to render binding adjudications and has interpreted the statute in making such an adjudication. Justice Scalia dissented in *Mead*, and would have held that *Chevron* deference is triggered whenever an agency renders an "authoritative" interpretation of a statute that it administers. *Id.* at 241.

For present purposes, the critical point is that under either conception of the pre-conditions for *Chevron* deference, the court must make an independent determination that the interpretation in question is one that is within the authority of the agency to make. If the question is whether Congress delegated power to the agency to engage in legislative rulemaking, then the existence of such authority must be established before applying *Chevron*. If the

question is whether Congress delegated power to the agency to make binding adjudications, then the existence of such authority must be established before applying *Chevron*. And even if the question were, as Justice Scalia urged in his *Mead* dissent, whether the agency had rendered an authoritative interpretation, it must be established that the agency had authority to speak to the issue. Neither the majority nor dissenting opinions in *Mead* suggested that courts would exercise anything other than independent judgment in establishing whether these preconditions to *Chevron* deference have been satisfied. To this extent, then this Court has already held—unanimously—that courts must exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority before the court engages in *Chevron*-style deference to an agency's interpretational views.

In short, the *Chevron* doctrine is not only consistent with a rule requiring courts to exercise independent judgment in determining whether an agency is acting within the scope of its delegated authority. *Chevron* requires that courts engage in such an inquiry.

IV. The Distinction Between Jurisdictional and Other Legal Issues Is Familiar To Judges, and *Chevron* Step One Is Not Appropriate For Resolving Questions of Agency Jurisdiction

There are two principal counter-arguments to the proposition that reviewing courts should exercise independent judgment in determining whether federal agencies are acting within the scope of their delegated authority before applying the two-step

Chevron doctrine. The first counter-argument is no principled distinction can be drawn between questions of agency jurisdiction and ordinary questions of legality. The second is that courts can adequately assure that agencies stay within the scope of their authority by exercising independent judgment at step-one of the *Chevron* process. Neither of these counter-arguments defeats the powerful reasons for determining questions of agency jurisdiction before turning to *Chevron*.

A.

In a concurring opinion in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988), Justice Scalia wrote:

> [T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority."

With respect, we believe there is a clear conceptual distinction between authority to act and the exercise of authority, between *ultra vires* and *contra legem*. This distinction, like other fundamental legal concepts, may be subject to manipulation. But the dangers of manipulation here are no more pronounced than they are in other areas of the law, where it is necessary to trust the good sense of judges in resisting efforts to collapse one concept into another.

To begin, no claim can be made that the distinction between scope of authority and exercise of authority—between jurisdiction and legality—is one that is

unfamiliar to judges or beyond the capacities of judicial administration. To ask whether a legal entity has "jurisdiction" is to inquire whether it has "[t]he legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to a particular matter; legal power to interpret and administer the law in the premises." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1347 (2d ed. 1954). To ask whether a legal entity has conformed to the law is to ask whether its exercise of acknowledged authority or "jurisdiction" complies with relevant legal constraints.

Federal judges are routinely asked to make and enforce this distinction. For example, federal courts must determine in nearly every case whether they have subject matter jurisdiction over the controversy. They must determine whether matters fall within federal question jurisdiction, diversity jurisdiction, admiralty jurisdiction, and so forth. *See* 28 U.S.C. § 1331 (federal questions); § 1332 (diversity); § 1333 (admiralty). They exercise independent judgment in resolving these questions, and they understand that the question of federal court jurisdiction is distinct from whether the defendant in the case did or did not comply with the law.

Similarly, federal courts are sometimes asked to determine whether particular exercises of legislative authority by Congress fall within the enumerated powers delegated by the people to the federal government in the Constitution. *E.g.*, *National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566 (2012). Federal courts in these cases readily understand that the question of federal legislative jurisdiction is distinct from other questions of legality. Clearly, therefore, no claim can be made that the

distinction between jurisdiction and legality—between power to decide and the correctness of a decision—is incoherent or beyond the capacities of judges to grasp and enforce.

It is true that Congress frequently delineates the scope of an agency's authority in the same statute in which other legal constraints on the agency's action are prescribed. In contrast, the subject matter jurisdiction of the courts is typically established by discrete statutes collected in title 28 of the U.S. Code. And federal legislative jurisdiction is established primarily in Article I of the Constitution, which is readily identified as a separate instrument from the statutes enacted by Congress. This difference may make the task of distinguishing between jurisdiction and legality marginally more difficult in the context of administrative agency action. But the difference only goes to the relative degree of difficulty in distinguishing questions about the scope of an agency's power from other questions of law implicated by agency action. It does not suggest that the inquiry is different in kind, or that it is less important to maintain jurisdictional boundaries where agency action is concerned than it is where judicial or legislative action is at issue. And it certainly does not establish that identifying the difference between power and legality is beyond the capacity of judges.

It is also important to recognize that the submissions of the parties in identifying questions that are jurisdictional will assist courts. Questions of agency jurisdiction will ordinarily arise when an agency starts to regulate where it has not previously regulated, or announces that it will decline to regulate where it has previously regulated. Parties who are aggrieved by an agency's deviation from its estab-

lished regulatory agenda will challenge the agency's decision on judicial review, and will allege that the agency is departing from the scope of its jurisdiction. This, of course, does not mean the court should set aside all departures by agencies from the scope of their previously-established regulatory activity. Historical practice does not define agency jurisdiction; agency jurisdiction is established by Congress. Nevertheless, challenges to agency action based on its exceeding (or falling short of) its jurisdiction will nearly always arise when an agency announces a shift in the scope of its regulatory activity. This will significantly assist in identifying issues that can fairly be described as jurisdictional.

The court of appeals, in the decision below, had no difficulty identifying the question presented in this case as being "jurisdictional." Pet'r's App. 36a-37a. The court had to decide whether the FCC had authority to interpret 47 U.S.C. § 332(c)(7)(B)(ii) of the Federal Communications Act, which prohibits state and local governments from failing to act "within a reasonable period of time" on a request to place, construct, or modify personal wireless service facilities. The statute expressly authorizes any person adversely affected by a failure to act within a reasonable time "to commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). No mention is made of enforcement of the "reasonable time" restriction by the FCC.[3] Although the court of appeals found the statute "silent" on the issue of the FCC's authority in this matter and hence

[3] In contrast, § 332(c)(7)(B)(v) expressly allows parties adversely affected by a decision to deny permitting authority based on "the environmental effects of radio frequency emissions" to petition the Commission for relief.

ambiguous, it had no doubt the issue was jurisdictional. The identification of the issue as jurisdictional was made easier by the fact that the FCC had never previously asserted authority to define "reasonable time," or to instruct "courts of competent jurisdiction" how to respond to petitions seeking relief.[4] The Commission's declaratory order was thus an unambiguous attempt to expand the scope of the Commission's regulatory authority relative to the baseline that had existed since the provision in question was adopted. The attempt to expand its authority was challenged by petitioners and others, which made it easy for the court to identify the issue as jurisdictional.

As to the danger of manipulation, this is no more serious in distinguishing jurisdiction from legality than in many other areas of the law. Certainly this distinction is not any more susceptible to manipulation than the distinctions between substance and procedure, law and equity, civil and criminal, prospective and retroactive, and a host of other distinctions that critically shape and organize the law. The danger of manipulation in distinguishing jurisdiction and legality is no greater than the danger of manipulation at step one of *Chevron*, which asks whether the relevant statutory provision is "clear" or "ambiguous," or at step two of *Chevron*, which asks whether the agency's interpretation is "reasonable" or "unreasonable." A willful judge will not be more significantly constrained if *Chevron* applies to questions of agency jurisdiction than he or she will be if jurisdiction must be determined by the exercise of independent judgment.

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[4] *See* Pet'r's App. at 49a-51a, discussing prior decisions by the FCC disclaiming authority to interpret § 332(c)(7)(B).

It is also relevant that questions of jurisdiction require an either-or, yes or no answer. In this sense jurisdiction differs from other concepts, like tallness (or clarity), that admit of answers falling along a continuum, and thus invite greater uncertainty in application. The either-or nature of jurisdictional questions makes it more difficult for courts to distinguish precedents establishing or denying jurisdiction over particular matters, which in turn limits the opportunity for case-by-case manipulation.

The critical point is that constitutional structure and the traditions of American government require that administrative bodies be confined to their jurisdiction, and that courts exercise independent judgment in enforcing this understanding. There is no reason to believe that courts lack the capacity to carry out this function. The danger of manipulation always exists, but can only be counteracted by trusting that federal courts will exercise sound judgment and discretion in performing their appointed role.

B.

The second counter-argument is that courts can adequately ensure that agencies adhere to limits on their jurisdiction by enforcing legislative intent at step one of the *Chevron* process. This Court has on occasion used *Chevron*'s step-one inquiry to limit agency efforts to expand their jurisdiction. Other than framing the discussion in terms of the *Chevron* doctrine, however, the Court's analysis in these cases is identical to what would have been undertaken in rendering an independent judgment about the scope of the agency's jurisdiction *before* turning to the *Chevron* doctrine. In this sense, the use of the *Chevron* framework was unnecessary to the decisions.

Determining the scope of agency jurisdiction in terms of *Chevron*'s step one, however, risks distorting the *Chevron* inquiry in ways that provide inappropriate guidance to lower courts. On the one hand, it carries the risk that lower courts will apply a mechanical understanding of the *Chevron* framework in cases involving agency jurisdiction, and will defer to agency determinations of their own jurisdiction whenever the text of the statute is silent or ambiguous on the issue. This ignores the importance of background principles like federalism and historically-derived conventions about the appropriate functions of different legal institutions—matters that require a more contextual analysis than simply identifying gaps and ambiguities in a statute.

On the other hand, a step-one inquiry carries the risk of diluting the *Chevron* doctrine in circumstances where it properly applies, by expanding the step-one inquiry in jurisdictional cases into a wide-ranging exercise in independent judgment that goes far beyond asking whether the statute speaks directly "to the precise question at issue," *Chevron*, 467 U.S. at 842, or whether the "intent of Congress is clear." *Id.* at 842-43. Rather than distort the *Chevron* process in this fashion, we believe it would be better to confront the question of agency jurisdiction directly, through the exercise of independent judicial judgment at what has come to be called "step zero" of *Chevron*.[5] Two decisions, in particular, illustrate these concerns.

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[5] *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207-11 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L. J. 833, 836-37 (2001).

In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, this Court was confronted with the question of whether the Food and Drug Administration (FDA) had authority to regulate tobacco products as customarily marketed. All parties in the case, including the FDA, described the question as "jurisdictional." Both the majority opinion and the dissenting opinion did the same. Rather than treat agency jurisdiction as a threshold question to be resolved before applying the two-step *Chevron* inquiry, however, the Court framed its inquiry in terms of *Chevron*'s step one, asking whether Congress had spoken to the precise question at issue. 529 U.S. at 132. After 28 pages of analysis, the Court concluded that Congress *had* spoken to the question of agency jurisdiction over tobacco. But the Court did not find this directive in the words of the Food Drug and Cosmetic Act (FDCA). Instead, the Court uncovered Congress's intention by considering contradictions between the agency's preferred tobacco policy and other provisions of the FDCA, the lengthy history of FDA disclaimers of regulatory authority communicated to Congress, and a variety of tobacco-specific statutes other than the FDCA that revealed a congressional purpose to reserve tobacco policy for itself. *Id.* at 133-61.

We do not suggest the jurisdictional analysis in *Brown & Williamson* was mistaken, or that the extensive analysis of the history of tobacco regulation was misguided. To the contrary, it was entirely appropriate given the importance of the jurisdictional question presented. Our points are simply, first, that the Court's independent analysis of the history of tobacco regulation would not have changed one iota if presented as an independent inquiry into the scope of the agency's jurisdiction rather than an application of

step one of *Chevron*. And second, the idea that Congress had spoken to the precise question at issue—over the course of dozens of hearings spread out over multiple decades and through seven separate statutes and amendments to statutes—was at the very least an unorthodox application of step one of *Chevron*, and one that seemingly obscures any distinction between *Chevron*-style deference and independent judicial review.

Similarly, in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990), the question was whether the Paperwork Reduction Act authorized the Office of Management and Budget (OMB) to review regulations mandating that employers disclose warnings about chemicals in the workplace to employees. After meticulously reviewing "the language, structure, and purpose of the Paperwork Reduction Act," 494 U.S. at 35, the Court concluded that Congress intended the Act to apply only to regulations requiring the disclosure of information to agencies. The analysis was indistinguishable from what the Court would do in deciding the issue *de novo*. Only at the very end of the opinion did the Court allude to the *Chevron* doctrine, suggesting that the case could be decided at step one because the intent of Congress was "clear." *Id.* at 42. Justice White, in dissent, thought that the decision departed from *Chevron* principles because the Court could not say "its interpretation is the *only* one Congress could possibly have intended." *Id.* at 45 (White J., dissenting). He also pointedly observed that the respondent had argued "*Chevron* should not apply in this case because OMB's regulations actually determine the scope of its jurisdiction under the Act," *id.* at 54, and noted that the majority did not address this argument.

Again, we do not suggest the jurisdictional analysis in *Dole* was incorrect or inappropriate. Our point is that framing the analysis in terms of *Chevron* was unnecessary to the decision, and the proposition that the jurisdictional question was "clear" was strained, since the ambiguity was eliminated only after an elaborate and independent inquiry into statutory structure, purpose, and history. In *Dole*, as in *Brown & Williamson*, the question of agency jurisdiction should have been addressed as a precondition of *Chevron* deference, not as an element in the application of *Chevron* deference.

Brown & Williamson and *Dole* suggest that this Court is entirely cognizant of the importance of questions about the scope of agency jurisdiction, and is prepared to engage in an appropriately contextual analysis of jurisdictional questions when they are presented. If the only thing at stake were how this Court writes its opinions, little would turn on whether jurisdictional questions are tackled at step one or step zero. But for every case in which this Court confronts a *Chevron* question, thousands are decided by the lower courts. Those courts need appropriate guidance on how to resolve those questions. Given the vital importance of judicial review in preserving the proper place of agencies in American government, the threshold question of agency jurisdiction should be highlighted for consideration by the lower courts, not obscured. The proper way to do this is to clarify that courts must exercise independent judgment in determining that agencies are acting within the scope of their authority before they turn to *Chevron*'s two-step framework.

CONCLUSION

The decision of the court of appeals should be reversed and remanded with instructions to the court to exercise independent judgment in determining whether the Commission has jurisdiction to interpret 47 U.S.C. § 332 (c)(7)(B)(ii).

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 11-1545 & 11-1547

In The
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICI CURIAE BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, AND WESTLANDS WATER DISTRICT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus Natural Water Resources Association ("NWRA") is a nonprofit, voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the western states. NWRA has member associations in California, Colorado, Idaho, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oregon, South Dakota, Texas, Utah, Washington, and Arizona.

Amicus Association of California Water Agencies ("ACWA") represents approximately 90% of the public water agencies in California. These public water agencies provide water supplies to their agricultural, urban and industrial customers, who are located in all parts of California. Many ACWA member agencies obtain water supplies by diverting water through their own facilities from various rivers, lakes and tributaries in California. Other ACWA member agencies obtain their water supplies pursuant to contracts with the U.S. Bureau of Reclamation ("USBR") or the California Department of Water Resources ("CDWR"), which operate the federal Central Valley Project

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[1] The parties have consented to the filing of this *amici* brief (Rule 37.3). This brief was not authored wholly or in part by counsel for any party, and no party, or parties' counsel, made a monetary contribution to fund preparation or submission of the brief (Rule 37.6).

and the State Water Project, respectively. These federal and state water projects divert water from the Sacramento-San Joaquin Delta, or from rivers feeding into the Delta, in order to provide water supplies for ACWA members and others.

Amicus Westlands Water District ("Westlands"), which is located in Fresno and King Counties in California, is the nation's largest agricultural water district in terms of irrigated acreage. Westlands supplies irrigation water to many of the farmlands of California's Central Valley – which produce a substantial portion of the fruits and vegetables grown in the nation – and also supplies water for domestic use in parts of the Central Valley. Westlands obtains its water supplies from the Central Valley Project pursuant to its contract with the USBR.

The *amici* have a significant interest in the question presented in this case. The question is whether the *Chevron* doctrine, as developed by this Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), applies to an agency's interpretation of a statute defining its jurisdiction. The *Chevron* doctrine holds that the courts should defer to an agency's permissible interpretation of an ambiguous statute.

The *amici* or their members obtain all or a substantial portion of their water supplies from major water projects operated by federal or state agencies in the western states. Federal regulatory agencies have in many instances interpreted federal statutes as

authorizing such agencies to exercise substantial jurisdiction and control over the water projects, and as precluding the operating agencies from providing water deliveries pursuant to their contracts with their customers, including the *amici*. For example, the U.S. Fish and Wildlife Service has interpreted the federal Endangered Species Act as requiring the operators of the federal and state water projects in California to reduce water deliveries to their customers in order to provide more water supplies for the benefit of federally-listed endangered species, notwithstanding that the project operators have entered into contracts with their customers that do not authorize such reduction of water deliveries. Similarly, the U.S. Environmental Protection Agency has interpreted the federal Clean Water Act as authorizing it to control the regulation, diversion and use of water from the Sacramento-San Joaquin Delta in California, notwithstanding that the regulation, diversion and use of the water has been traditionally and historically controlled by the State of California through its water rights agency. The *amici* believe that these federal statutes do not authorize these federal agencies to exercise the full extent of jurisdiction and authority that they claim, and that the agencies' interpretation of their jurisdiction and authority is not entitled to deference under the *Chevron* doctrine. Therefore, the *amici* have a significant interest in the question whether the *Chevron* doctrine

applies to an agency's interpretation of its jurisdiction.

SUMMARY OF ARGUMENT

The petitions present the question whether the *Chevron* doctrine applies to an agency's interpretation of a statute defining its jurisdiction. The *Chevron* doctrine requires deference to an agency's interpretation of a statute, if the statute is "ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Fifth Circuit applied the *Chevron* doctrine in upholding the Federal Communications Commission's ("FCC") interpretation of its authority under the Telecommunications Act of 1996. Under the FCC's interpretation, the FCC is authorized to adopt regulations governing the authority of local governments to regulate the authorization, construction and placement of personal wireless communication facilities, by, for example, requiring local governments to process applications for such facilities within specified timeframes. To that extent, the FCC's interpretation authorizes the FCC to preempt local land use and zoning regulations applicable to personal wireless service facilities.

The *amici* argue in this brief that the *Chevron* deference doctrine does not apply to an agency's interpretation of a statute defining its jurisdiction, if the agency's interpretation authorizes it to regulate a

subject traditionally and primarily regulated by state and local governments and thus limits the authority of state and local governments to regulate the subject. This Court has declined to apply *Chevron* deference where an agency interprets a statute as authorizing it to regulate subjects traditionally regulated by state and local governments, such as water use and land use. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159, 172-174 (2001); *Rapanos v. United States*, 547 U.S. 715, 737 (2006) (plurality opinion). The Court declined to apply *Chevron* in these cases because the agency interpretation would result in a "significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738. If an agency interprets an admittedly ambiguous statute as authorizing it to regulate subjects of traditional state and local regulation, the agency interpretation potentially conflicts with principles of federalism that this Court has fashioned in interpreting the Constitution, federal statutes and federal common law. These principles of federalism – which are themselves a canon of statutory construction – trump the *Chevron* doctrine, because the former rests on a constitutional foundation and the latter on the lesser principle of judicial prudence.

In this case, the FCC's interpretation of its authority under the Telecommunications Act potentially impinges on the traditional authority of local governments to regulate zoning and land use, by

requiring that local governments comply with FCC-established procedural and substantive requirements relating to the authorization, construction and placement of personal wireless communication facilities. As this Court has said, "regulation of land use [is] a function traditionally performed by local governments." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). Indeed, regulation of land use is a "quintessential" local function. *Rapanos*, 547 U.S. at 738; *FERC v. Mississippi*, 456 U.S. 742, 767 (1982). The Telecommunications Act specifically provides for the "[p]reservation of local zoning authority," and provides that state and local governments have "general authority" to regulate the "construction" and "placement" of wireless communications facilities. 47 U.S.C. § 332(c)(7)(A). Although the Act authorizes the FCC to adopt general regulations to carry out the Act, *id.* at § 201(b), the Act does not establish specific procedural or substantive requirements that preempt local requirements, or directly authorize the FCC to adopt procedural or substantive requirements that preempt local requirements.

Therefore, the FCC's interpretation of the Telecommunications Act authorizes it to regulate a subject – land use – that is traditionally and primarily regulated by local governments, and the FCC's interpretation preempts local land use regulation to that extent. For this reason, the *Chevron* doctrine does not properly apply in this case. Regardless of whether the Fifth Circuit reached the right result in construing the Telecommunications Act, the court employed the

wrong methodology by invoking the *Chevron* doctrine in reaching its result.

ARGUMENT

I. THE *CHEVRON* DOCTRINE DOES NOT APPLY TO AN AGENCY'S INTERPRETATION OF ITS JURISDICTION, IF THE AGENCY'S INTERPRETATION AUTHORIZES IT TO REGULATE SUBJECTS TRADITIONALLY AND PRIMARILY REGULATED BY STATE AND LOCAL GOVERNMENTS.

A. The Applicability of the *Chevron* Doctrine Must Take into Consideration Whether the Agency Interpretation Allows Federal Intrusion into Areas Traditionally Regulated by State and Local Governments.

Under the *Chevron* doctrine, an agency's interpretation of a statute that it administers is entitled to deference, if the statute is "silent or ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984); *see Mayo Foundation v. United States*, 131 S. Ct. 704, 711 (2011); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). The *Chevron* doctrine does not apply, however, unless "it appears that Congress delegated authority to the agency

generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); *see Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("[T]he [agency] rule must be promulgated pursuant to authority Congress has delegated to the official."). Under the *Chevron* doctrine, the reviewing court must undertake a two-step analysis in determining whether *Chevron* applies: first, the court must determine whether Congress has directly addressed the subject matter or instead whether the statute is ambiguous; and, second, if the statute is ambiguous, the court must defer to the agency interpretation if it is permissible. *Chevron*, 467 U.S. at 842-843. Even if *Chevron* does not apply, a court may still defer to an agency's statutory interpretation if the interpretation is "persuasive." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Although the *Chevron* doctrine on its face appears to categorically require deference if certain objective factors are present – if the statute is ambiguous and the agency's interpretation permissible – this Court has held that *Chevron*'s applicability is not strictly based on these objective factors. Rather, *Chevron*'s applicability may "vary with circumstances," such as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228. Thus, for example, *Chevron*

deference is more likely to apply to an agency's adoption of a regulation through the formal rulemaking process, in which notice-and-comment procedures apply, than to an agency's adoption of a less formal guidance, in which these procedures do not apply. *Mead Corp.*, 533 U.S. at 229-230; *Reno v. Koray*, 515 U.S. 50, 61 (1995).

This Court has, on occasion, declined to apply *Chevron* deference where it conflicts with other canons of statutory construction. For example, this Court has construed federal statutes in order to avoid constitutional conflicts, rather than deferring to agency interpretations that created such conflicts. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172-173 (2001) (interpreting Clean Water Act); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (interpreting National Labor Relations Act). In addition, this Court has adopted other canons of construction – such as the canon that Congress presumptively does not repeal statutes by implication, *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936), and the canon that statutes must be construed harmoniously to avoid conflicts, *Morton v. Mancari*, 417 U.S. 535, 549 (1974) – and these canons presumably also limit deference to agency interpretations under *Chevron*.

This Court has considered an additional, and indeed virtually dispositive, factor in determining whether the *Chevron* deference doctrine applies. This

factor is whether an agency's statutory interpretation expands the agency's authority to regulate a subject traditionally and primarily regulated by state and local governments under their police power or other authority, and thereby limits state and local authority to regulate the subject. This factor commonly arises where, as in this case, an agency interprets a statute defining its jurisdiction, because an agency's expansive interpretation of its jurisdiction may have the effect of limiting, and thus preempting, state and local authority to regulate the subject. In cases where this factor is present, countervailing principles of federalism come into play that necessarily limit judicial deference to the agency's interpretation. Under these principles of federalism, Congress presumptively does not authorize federal intrusion into areas traditionally regulated by state and local governments unless it clearly says so. *E.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994). And, if Congress speaks with a clear voice, the statute is not ambiguous and the *Chevron* doctrine does not apply by its terms.

These principles of federalism comprise a separate canon for construing statutes, one that stands on a higher footing than the *Chevron* doctrine, because the former rests on a constitutional foundation and the latter on the lesser principle of judicial prudence. This federalism canon of construction is similar in many ways to the constitutional avoidance doctrine,

because both preclude deference to agency statutory interpretations that limit the states' sovereign authority under the Constitution, such as under the Tenth Amendment and the Commerce Clause. *Compare Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (applying constitutional avoidance doctrine in construing statute), *with Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (applying principles of federalism in construing statute). The federalism canon of construction also applies, however, even where the agency interpretation does not invite a constitutional conflict; Congress may, and often does, defer to state and local authority in carrying out a federal statutory scheme, even though not constitutionally bound to do so, simply because it believes that the states in their collective capacity are better able to effectuate the federal statutory scheme than a federal agency. *E.g.*, Clean Water Act, 33 U.S.C. §§ 1251(b) (recognizing "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"), 1342(b) (authorizing states to administer National Pollutant Discharge Elimination System permit programs).

In the amici's view, the Court in this case should expressly establish two fundamental principles relating to the applicability of the Chevron doctrine that this Court has not previously specifically articulated: first, the Chevron doctrine, assuming that its objective criteria are otherwise met, categorically does not apply

to an agency interpretation that expands federal authority to regulate subjects traditionally and primarily regulated by state and local governments; and, second, the reviewing court must necessarily consider whether the agency interpretation has this effect in determining whether the Chevron doctrine applies. If the reviewing court fails to undertake this inquiry in applying *Chevron*, the court may blindly defer to an agency interpretation because of the presence of certain objective criteria, without taking into account the principles of federalism that are at the heart of the constitutional order.

B. This Court Has Fashioned and Applied Principles of Federalism in Many Contexts.

The principles of federalism fashioned by this Court are, of course, based on the Constitution itself, which provides for a diffusion of national sovereign power between the federal government and the states rather than the concentration of national power in a single national government. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government."). This Court has fashioned and applied these principles of federalism in many contexts – not only in interpreting the Constitution, but also in interpreting federal statutes and federal common law.

In interpreting the Constitution, this Court has held that the Commerce Clause grants broad authority to Congress to regulate interstate commerce, but that the Commerce Clause nonetheless limits Congress' power to regulate subjects traditionally regulated by the states. *Nat'l Federation of Business v. Sibelius*, 132 S. Ct. 2566, 2578 (2012); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *United States v. Morrison*, 529 U.S. 598, 619 (2000). "[T]he scope of the interstate commerce power must be considered in light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local. . . ." *Lopez,* 514 U.S. at 557 (citations and internal quotation marks omitted). Under the Tenth Amendment, Congress may not "commandeer" state resources in order to implement congressional goals and objectives. *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."); *Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot circumvent that prohibition by conscripting the State's officers directly."). Under the Eleventh Amendment, a state has sovereign immunity from a suit by its citizens in federal court, unless the state waives its immunity and consents to the suit. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the

statute."); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

In interpreting federal statutes, this Court has held that Congress presumptively does not preempt the "historic police powers of the States" unless Congress' purpose is "clear and manifest." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "If Congress intends to alter the usual balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations and internal quotation marks omitted). *See also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be clear and manifest." (citations and internal quotation marks omitted)); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[T]he ordinary rule of statutory construction [is] that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (citation and internal quotations marks omitted)); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). Based on these limiting principles, this Court has narrowly construed federal statutes limiting state sovereign authority. *E.g., Hess*

v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994); *FERC v. Mississippi,* 456 U.S. 742, 767-768 (1982).

This Court has also applied principles of federalism in fashioning its own rules of jurisprudence, which in some cases may be a form of federal common law and in other cases a limitation on federal common law. Under the abstention doctrine, certain federal actions involving fundamental state law principles and issues must be maintained in the state courts, not the federal courts. *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Under the equal footing doctrine, the states are deemed to acquire sovereign ownership and control of their navigable waters upon their admission to statehood, subject only to the federal government's paramount power to regulate navigable waters under the Commerce Clause. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). This Court has held that state law, not federal common law, applies in defining property in our federal system. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). This Court has sometimes "borrowed" state laws in interpreting federal law. *American Elec. Power Co. v. Connecticut,* 131 S. Ct. 2527, 2536 (2011) ("Absent a demonstrated need for a federal rule of decision, the Court has taken the

prudent course of adopting the ready made body of state law as the federal rule of decision until Congress strikes a different accommodation." (citations and internal quotation marks omitted)); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) ("Federal interpretation of the federal law will govern, not state law," but "state law . . . may be resorted to in order to find the rule that will best effectuate the federal policy."); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("[I]n our choice of the applicable federal rule we have occasionally selected state law."). This Court has limited the scope of the federal common law in instances where its application would impair the sovereignty of the states in our federal system. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.").

Although these principles of federalism establish a canon for construing ambiguous statutes, they are more than that: They are the bedrock principles of the constitutional foundation itself. "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citation and internal quotation marks omitted). These principles of federalism enhance the liberties of individual citizens that are inherent in the

constitutional design. "State sovereignty is not an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Nat'l Federation of Business v. Sibelius*, 132 S. Ct. 2566, 2578 (2012). As Justice Kennedy has observed, "[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. concurring). This Court has stated:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458. This Court has plainly indicated that these principles of federalism must be applied in construing ambiguous congressional statutes, stating:

> [I]nasmuch as this Court in *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] has left primarily to the political process the protection of the States against intrusive exercise of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such

> an exercise. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory, 501 U.S. at 464, quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988) (original emphasis).

C. This Court Has Not Applied *Chevron* Deference Where Its Application Would Contravene Principles of Federalism.

1. Decisions Declining to Apply *Chevron* Deference

These constitutionally-imbedded principles of federalism inform the applicability of the *Chevron* doctrine in the context of an agency's interpretation of its jurisdiction.[2] If an agency interprets its

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[2] To be sure, it may be difficult to distinguish a statute defining an agency's "jurisdiction" from one that does not define its "jurisdiction." In a broad sense, all statutes granting authority to agencies define the agencies' jurisdiction, because all such statutes authorize agencies to perform certain functions and activities and, to that extent, define the agencies' "jurisdiction" to perform these functions and activities. *See United States v. Mead Corp.*, 533 U.S. 218, 227-228 (2001) (an agency has only authority delegated to it by Congress); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-473 (2000) (same). Although some statutes are reasonably clear in defining an agency's "jurisdiction," other statutes are less clear, and are not specifically couched in terms of agency "jurisdiction." In this case, for example, the FCC claims authority to regulate certain activities relating to personal

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jurisdiction expansively, as extending to subjects traditionally regulated by state and local governments, the agency interpretation is likely to conflict with principles of federalism and *Chevron* deference would be inappropriate. If, instead, an agency interprets its jurisdiction narrowly as not extending to such subjects, the agency interpretation is likely to converge with principles of federalism and *Chevron* deference would be appropriate.

This Court has declined to grant *Chevron* deference to agency interpretations that – by authorizing federal intrusion into areas traditionally regulated at the state and local level – contravened these principles of federalism. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), this Court declined to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the Clean Water Act ("CWA"), which authorized the Corps to regulate "isolated" waters, *i.e.*, waters not physically connected to navigable waters. The CWA authorizes the Corps to regulate "navigable waters," which are defined as "the waters of the United States," 33 U.S.C. §§ 1344(a), 1362(7); the Corps' regulation

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wireless service facilities pursuant to its general authority under the Telecommunications Act to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Pet. App. 87a. The Act does not specifically mention the FCC's "jurisdiction" to impose these regulations. Thus, the Act effectively defines the FCC's jurisdiction without explicitly saying so.

interpreted the latter phrase as including "isolated" waters. Although the Court stated that the phrase "the waters of the United States" is not ambiguous and does not include "isolated" waters, the Court also stated that – even if the phrase were ambiguous – there would be no basis for deferring to the Corps' regulation under *Chevron*. *SWANCC*, 531 U.S. at 172-173. The Court stated:

> Where an administrative interpretation of a statute invokes the *outer limits* of Congress' power, we would expect a *clear indication* that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where *the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power*. Thus, where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Id. at 172-173 (emphases added; citations and internal quotation marks omitted). The Court stated that the states have traditionally regulated water use and land use, and that to allow the Corps of Engineers to regulate "isolated" waters having no connection to

navigable waters would result in a "significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. The Court overturned the Seventh Circuit decision below, which had relied on *Chevron* in upholding the Corps' regulation. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 191 F.3d 845, 853 (7th Cir. 1999), *rev'd*, 531 U.S. 159, 174 (2001). Thus, the Court declined to grant *Chevron* deference to a federal regulation that expanded federal authority to regulate subjects traditionally regulated at the state and local level, and instead applied long-standing principles of federalism in construing the CWA.[3]

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[3] The history of the *SWANCC* case demonstrates how the *Chevron* doctrine can be misapplied to reach results contrary to an administrative agency's actual intent in adopting a regulation. Shortly after the CWA's enactment in 1972, the Army Corps of Engineers adopted a regulation that limited the Corps' authority to regulate waters under the CWA; the Corps' regulation interpreted the phrase "the waters of the United States" – which defines the Corps' jurisdiction under the CWA – as limited to traditionally navigable waters that this Court has recognized as within Congress' jurisdiction under the Commerce Clause. *SWANCC*, 531 U.S. at 168-169. The federal district court reviewing the Corps' regulation declined to grant *Chevron* deference; instead, the court, applying *de novo* review, overturned the regulation on the ground that the phrase "the waters of the United States" includes waters beyond those that this Court has recognized as within Congress' traditional jurisdiction. *NRDC v. Callaway,* 382 F.Supp. 685, 686 (D. D.C. 1975). The Corps, in response, adopted a regulation interpreting the phrase more broadly; the new regulation authorized the Corps to regulate non-traditionally navigable waters, such as sandflats, mudflats, prairie potholes, as well as wetlands. 33 C.F.R.

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Similarly, in *Rapanos v. United States*, 547 U.S. 715 (2006), this Court again declined to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the CWA, which interpreted the statutory phrase "the waters of the United States" as including virtually all wetlands in the nation. The Court's plurality opinion stated that the Corps' "expansive" interpretation of the phrase was foreclosed by its "natural definition," *Rapanos*, 547 U.S. at 731, but that "[e]ven if the phrase 'the waters of the United States' were ambiguous . . . , our own canons of construction would establish that the Corps' interpretation of the statute is impermissible." *Id.* at 737. Quoting the *SWANCC* decision, the plurality opinion stated that "the Government's expansive interpretation would 'result in a significant impairment of the States' traditional and primary authority over land and water use.'" *Id.* at 738. The plurality opinion stated that "[r]egulation of land use . . . is a

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§ 328.3. In the *amici*'s view, the *Chevron* deference doctrine does not apply where, as in *SWANCC*, an agency adopts a regulation expansively interpreting its jurisdiction in response to a lower court decision overturning the agency's earlier regulation narrowly interpreting its jurisdiction. Otherwise, *Chevron* would be applied as a basis for deference to the lower court's statutory interpretation rather than the agency's own original statutory interpretation.

Notably, in *Rapanos v. United States*, 547 U.S. 715, 737 (2006), this Court's plurality opinion declined to apply *Chevron* deference in reviewing the Corps' new regulation as applied to wetlands, and this Court's dissenting opinion argued that *Chevron* deference should be applied in upholding the Corps' regulation. *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

quintessential state and local power," and that "[w]e ordinarily expect a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id.* (citations and internal quotation marks omitted). As in *SWANCC*, the plurality opinion applied principles of federalism rather than the *Chevron* doctrine in construing the CWA.[4]

In *Gonzales v. Oregon*, 546 U.S. 243 (2006), this Court declined to grant *Chevron* deference to the U.S. Attorney General's interpretation of his authority under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, under which the Attorney General claimed authority to override state laws allowing doctors to prescribe regulated drugs for use in physician-assisted suicide. The Court held that the statute did not delegate authority to the Attorney General to decide whether doctors should be allowed to administer such drugs. *Gonzales*, 546 U.S. at 258-269. "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an

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[4] The plurality opinion interpreted the phrase "the waters of the United States" as including only "relatively permanent, standing or flowing bodies of water," *Rapanos*, 547 U.S. at 732, and as including only wetlands that have a "continuous surface connection" to such waters, *id.* at 742. Justice Kennedy wrote a concurring opinion arguing that the phrase "the waters of the United States" also includes wetlands that have a "significant nexus" to navigable waters, *id.* at 782 (Kennedy, J., concurring), but Justice Kennedy's concurring opinion, like the plurality opinion, did not apply the *Chevron* doctrine in reaching its conclusion.

administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." *Id.* at 258 (citation omitted.) The Court relied on principles of federalism in reaching this conclusion, stating:

> [T]he background principles of our federal system . . . belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements [citations] or presumptions against pre-emption [citations] to reach this commonsense conclusion.

Id. at 274.[5]

Even before *Chevron* was decided in 1984, this Court has applied long-standing principles of federalism in construing federal statutes that defined the authority of the states to regulate certain subjects,

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[5] In *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), this Court applied the *Chevron* doctrine as part of its analysis in upholding the Secretary of the Interior's regulation defining "take" under the Endangered Species Act ("ESA"), 515 U.S. at 703, but the Court applied *Chevron* only after it had already determined that its interpretation was supported by the "text of the Act," *id.* at 697, by the "broad purpose" of the Act, *id.* at 698, and by the fact that Congress "understood" that the Act prohibited "indirect as well as deliberate takings," *id.* at 700. Although the Court's decision may have expanded federal authority at the expense of state and local authority, the decision was based largely on the Court's own analysis of the statute and not on the Court's deference to the Secretary's regulation under *Chevron*.

such as water use and land use, rather than deferring to federal agency interpretations that expanded federal authority and limited state authority to regulate such subjects. In *California v. United States*, 438 U.S. 645 (1978), this Court rejected the United States' argument that deference should be accorded to the Secretary of the Interior's interpretation of the Reclamation Act of 1902, which authorizes him to regulate federal reclamation projects in the western states; the Secretary interpreted the Act as authorizing him to regulate water uses served by the projects, and as precluding the states from regulating such water uses. Specifically, the Secretary interpreted section 8 of the Act – which requires him to comply with state laws relating to the "control, appropriation, use, or distribution" of water, 43 U.S.C. §§ 372, 383 – as applicable only to state laws defining proprietary rights in water, and as not applicable to state laws regulating water uses. Rejecting the United States' argument, this Court held that section 8 authorizes the states to regulate water uses served by the federal projects, and that the Secretary is required to comply both with state laws regulating water uses and with state laws defining proprietary rights. The Court reasoned that Congress had adopted a long-standing policy of deference to state water laws, and that this congressional policy informed the meaning of the Reclamation Act. *Id.* at 653. As the Court stated, "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful

and continued deference to state water law by Congress." *Id*[6]. Thus, the Court deferred to Congress' long-standing policy of recognizing the states' primary authority to regulate water uses, rather than deferring to the Secretary's interpretation that limited such state authority. The Court's landmark decision likely would have been entirely different if this Court had granted *Chevron*-like deference to the Secretary's expansive interpretation of his authority under the federal statute.

2. Decisions Applying *Chevron* Deference

Conversely, *Chevron* deference is more appropriate where a federal agency interprets an ambiguous statute as *limiting* the agency's authority to regulate subjects of traditional state and local regulation, because such an agency interpretation is congruent rather than incongruent with the principles of federalism that form the constitutional foundation. Indeed, an agency interpretation that applies these federalism principles is entitled to heightened deference, because the agency interpretation furthers the constitutional design rather than impedes it. An agency interpretation that limits the agency's authority to

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[6] On remand, the Ninth Circuit, in a decision written by then-Judge Kennedy, reaffirmed that the Reclamation Act must be read in light of Congress' long-standing policy of deference to state water laws. *United States v. California*, 694 F.2d 1171, 1176, 1178 (9th Cir. 1982).

regulate subjects of traditional state and local regulation gains the benefit of two canons of construction – the federalism canon, which presumes that Congress does not intrude into traditional areas of state regulation unless its intention is "unmistakably clear," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989), and the *Chevron* canon, which provides for deference to an agency's interpretation of a statute. An agency interpretation supported by both the *Chevron* canon and the federalism canon is entitled to much greater deference than an agency interpretation supported by the former canon but that conflicts with the latter. Indeed, the *Chevron* canon does not properly apply in the latter situation.

For example, in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court applied *Chevron* deference in upholding and applying a federal regulation that limited the consultation obligation of federal agencies under the Endangered Species Act ("ESA"), and thereby limited federal intrusion into areas traditionally regulated by the states. There, the State of Arizona applied to the Environmental Protection Agency ("EPA") for authority to administer its permit program under the CWA; the CWA provides that the EPA "shall" approve a state permit program if it meets the CWA's statutory criteria. 33 U.S.C. § 1342(b). The EPA determined that the Arizona program met the statutory criteria, and approved the Arizona program. The Ninth Circuit held that the EPA violated the ESA by failing to

"consult" with a designated service agency before approving the Arizona program; under the ESA, a federal agency must "consult" before taking any action "authorized, funded or carried out" by the agency that may affect an endangered species. 16 U.S.C. §§ 1536(a)(2), -(c)(1).

This Court, overturning the Ninth Circuit decision, granted *Chevron* deference in upholding and applying a regulation adopted by the Secretaries of Interior and Commerce that limited the consultation obligation of federal agencies under the ESA. *Home Builders*, 551 U.S. at 665-668, 673. The Secretaries' regulation required federal agencies to consult in "all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). This Court held that since the CWA provides that the EPA "shall" approve state permit programs that meet the statutory criteria, the EPA had no "discretionary" authority to disapprove the Arizona program, and therefore the EPA was not required to consult before approving the Arizona program. *Home Builders*, 551 U.S. at 665-668, 673.

Thus, *Home Builders* invoked *Chevron* in upholding and applying the Secretaries' regulation limiting the consultation obligation of federal agencies under the ESA. By limiting the consultation obligation, the regulation limited federal intrusion into the states'

traditional authority to regulate fish and wildlife.[7] As applied in *Home Builders*, the regulation effectively broadened the states' ability to obtain federal approval of state permit programs under the CWA, consistently with Congress' declared intent in the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

In the same vein, the Eleventh Circuit recently applied *Chevron* deference in upholding a federal regulation that limited federal jurisdiction under the CWA and thereby limited federal intrusion into areas of traditional state regulation. *Friends of the Everglades, et al. v. S. Fla. Water Mgmt. Dist., et al.*, 570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 643 (2010). There, an EPA regulation provided that a transfer of water containing a pollutant from one water body to another water body does not result in the "addition" of the pollutant to "the waters of the United States" if both water bodies fall within the latter classification – since the pollutant was already in "the waters of the United States" to begin with – and therefore the transferor is not required to obtain a permit under the CWA in order to make the

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[7] In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), this Court held that the states' authority to regulate wild animals is subject to the limitations of the Commerce Clause, but that "[w]e consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and welfare of their citizens." *Hughes*, 441 U.S. at 337.

transfer. 40 C.F.R. § 122.3(i). The Eleventh Circuit held that the CWA is ambiguous concerning whether a water transfer results in the "addition" of a pollutant; that the EPA's regulation provides a permissible construction of the statutory language; and therefore that *Chevron* deference was appropriate. *Friends of the Everglades*, 570 F.3d at 1127. Notably, the Eleventh Circuit declined to follow the Second Circuit's earlier decision in *Catskill Mountains Chapter v. New York City*, 451 F.3d 77 (2d Cir. 2006), which had reached the opposite conclusion prior to the EPA's adoption of its regulation. In effect, the Eleventh Circuit deferred to the EPA's limiting interpretation of its authority under *Chevron*, as this Court did in *Home Builders*, rather than following the precedent of a sister circuit court. Accord, *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (holding that *Chevron* deference applies even though agency interpretation conflicts with federal circuit court precedents).[8]

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[8] Another case pending before this Court on the merits, *Decker, et al., v. Northwest Environmental Defense Center, et al.*, Nos. 11-338 and 11-347, raises the question whether the *Chevron* deference doctrine applies to the EPA's Silvicultural Rule, which defines the phrase "point source discharge," as used in the CWA, as not applicable to stormwater discharges from logging road operations. 40 C.F.R. § 122.27(b). Under the Silvicultural Rule, such stormwater discharges are subject to state and local laws regulating "nonpoint source discharges." *Id.*

In sum, *Chevron* deference does not properly apply where an agency construes an ambiguous federal statute as authorizing it to regulate subjects of traditional state and local authority, as this Court held in *SWANCC* and *Rapanos*, but *Chevron* deference may be appropriate where an agency construes a statute as precluding it from regulating such subjects, consistently with this Court's decision in *Home Builders*. As this Court has stated, "the background principles of our federal system . . . belie the nation that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Gonzales v. Oregon*, 546 U.S 243, 274 (2006). By the same token, the "background principles" of our federal system belie the notion that an agency interpretation of an "obscure" grant of authority is entitled to deference under *Chevron*, where the agency interpretation allows federal intrusion into areas "traditionally supervised" by the states.

II. THE FIFTH CIRCUIT WRONGLY APPLIED THE *CHEVRON* DOCTRINE.

The Fifth Circuit applied the *Chevron* doctrine in upholding the FCC's interpretation of its authority under the Telecommunications Act. The Fifth Circuit did not, however, consider whether the FCC's interpretation expanded the agency's authority and limited state and local authority to adopt zoning and land use requirements for wireless communication

facilities. By failing to undertake this inquiry, the Fifth Circuit wrongly applied the *Chevron* doctrine.

The statutory dispute concerns the meaning of two provisions of the Telecommunications Act of 1996 – subsections (A) and (B) of section 332(c)(7) – which grant authority to state and local governments to regulate personal wireless service facilities and also impose limitations on the grant of such authority. 47 U.S.C. §§ 332(c)(7)(A), -(B). Subsection (A) – entitled "[p]reservation of local zoning authority" – grants "[g]eneral authority" to state and local governments to regulate the placement, construction and modification of personal wireless service facilities, and provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit the authority" of state and local governments to adopt such regulations. *Id.* at § 332(c)(7)(A).

Subsection (B) imposes "[l]imitations" on the grant of authority to state and local governments contained in subsection (A). *Id.* at § 332(c)(7)(B). Subsection (B) provides that state and local governments shall not "unreasonably discriminate" among providers of functionally equivalent services, and shall not "prohibit" the provision of personal wireless services. *Id.* at § 332(c)(7)(B)(i). The subsection also provides that state and local governments shall act on applications to place, construct or modify personal wireless service facilities "within a reasonable period of time," and that any person injured by a state or local government's "failure to act" has the right to seek judicial relief within a specified time period. *Id.*

at § 332(c)(7)(ii), -(v). Subsection (B) does not, however, establish specific timeframes for determining a "reasonable period of time" or "failure to act," or specifically prohibit state or local governments from denying applications based on the presence of other competitors in the market.

The FCC, in its Declaratory Ruling, concluded that the Telecommunications Act authorizes the FCC to establish specific timeframes that state and local governments must comply with in processing applications for personal wireless communication facilities,[9] and also that the Act authorizes the FCC to prohibit these governments from denying applications based solely on the presence of one or more competitors in the market. Pet. App. 116a-120a, 127a-128a; *City of Arlington, et al. v. Federal Communications Comm'n*, 668 F.3d 229, 235-236 (5th Cir. 2012). Thus, the FCC claimed authority under the Act to adopt both procedural requirements, pertaining to timeframes for

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[9] Specifically, the FCC concluded that the phrase "within a reasonable period of time," as used in subsection (B)(ii), presumptively means 90 days for applications requesting modifications, *i.e.*, "collocations," of existing personal wireless service facilities, and 150 days for all other applications. *City of Arlington, et al. v. Federal Communications Comm'n*, 668 F.3d 229, 235 (5th Cir. 2012). According to the FCC, there has been no "failure to act" within the meaning of subdivision (B)(v) if the state or local government acts on these applications within the 90-day or 150-day time frames. *Id.* If, on the other hand, the state or local government fails to act within these time frames, the state or local government has not acted "within a reasonable period of time" and thus has caused a "failure to act." *Id.*

processing applications, and substantive requirements, pertaining to the grounds for denying applications, that apply to state and local regulation of the wireless communication facilities. The FCC claimed authority to adopt these requirements under its statutory authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); Pet. App. 87a. The FCC also contended that subdivision (A) does not limit its authority to adopt the timeframes, because subdivision (A) simply prohibits the FCC from creating additional "limitations" beyond those enumerated in subdivision (B). *Id.*

It is notable that the FCC thus *narrowly* construed the provision that grants *broad* regulatory authority to state and local governments, *i.e.*, subsection (A), and *broadly* construed the provision that *limits* the grant of such state and local authority, *i.e.*, subsection (B). The FCC claimed authority to adopt these constructions pursuant to its general statutory authority to adopt regulations "to carry out the provisions of this Act" – a virtually boilerplate provision that commonly appears in statutes administered by a federal agency. Under the FCC's interpretation, a state or local government must comply with FCC-mandated timeframes, rather than its own timeframes, in determining what constitutes a "reasonable period of time" and "failure to act" – even though the statute does not define these terms or specifically authorize the FCC to define them. The

FCC has construed an admittedly ambiguous statute as authorizing it to establish procedural and substantive requirements that preempt state and local requirements, notwithstanding that the statute expressly provides for the "[p]reservation of local zoning authority." 47 U.S.C. § 332(c)(7)(A).

The Fifth Circuit mechanically applied the *Chevron* doctrine in upholding the FCC's regulations because, the court stated, the two objective factors requiring *Chevron* deference were present – the Telecommunications Act is "ambiguous" and the FCC's interpretation is "permissible." *Arlington*, 668 F.3d at 248-254. The court did not consider other factors that this Court has applied in determining the applicability of *Chevron*, such as the agency's "relative expertness." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). This factor appears to weigh against *Chevron* deference, because state and local governments – not the federal government – have traditional expertise in adopting zoning and land use regulations pertaining to communication facilities, a category that includes the wireless communication facilities involved here.

Most significantly, the Fifth Circuit failed to consider an additional factor – indeed, in the *amici*'s view, the determinative factor – in determining whether *Chevron* applies. This factor is whether the FCC's statutory interpretation authorizes it to regulate a subject traditionally regulated by state and local governments, and thus limits traditional state and local authority to regulate the subject. This Court

has consistently held that the regulation of land use, including the adoption of zoning regulations, is a traditional – indeed "quintessential" – function of state and local governments. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*") (states have "traditional and primary power over land and water use."); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("Regulation of land use . . . is a quintessential state and local power."); *FERC v. Mississippi*, 456 U.S. 742, 767 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). In *SWANCC* and *Rapanos,* this Court struck down federal regulations that resulted in a "significant impingement" of the states' "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738.

The FCC regulations, at least on their surface, appear to regulate land use by establishing timeframes for local governments to process applications for personal wireless communication facilities. Under the FCC regulations, a local agency that wishes to adopt or apply zoning restrictions for the placement of wireless communication facilities must comply with FCC-mandated timeframes, rather than the agency's own timeframes, in processing applications to construct and place such facilities. There may be legitimate reasons for the local agency to take more

time to process such applications than the FCC regulation allows; for example, the local agency may need to take additional time in establishing general land use and zoning plans applicable to wireless service facilities, and to determine how to integrate the construction and placement of individual facilities into the general plans. Under the FCC regulations, however, the local agency's reasons for taking additional time are entitled to no weight or consideration. Thus, the FCC has established national procedural and substantive standards applicable to the construction and placement of personal wireless communication facilities, rather than allowing state and local governments to establish their own standards. The Telecommunications Act, on the other hand, expressly grants "general authority" to state and local governments to establish these standards and provides for the "[p]reservation of local zoning authority," subject only to "limitations" that do not mention the standards adopted by the FCC. 47 U.S.C. § 332(c)(7)(A), -(B).

The *amici* do not, however, contend that the FCC's interpretation of its authority under the Telecommunications Act is necessarily incorrect. Nor do the *amici* contend that the objective factors cited by the Fifth Circuit as the basis for applying *Chevron* – that the statute is "ambiguous" and the agency interpretation "permissible" – are not present in this case. Rather, the *amici* contend that the FCC's interpretation authorizes it to regulate a subject – land use – that is traditionally regulated by state and local

governments, and thus that the Fifth Circuit wrongly applied the *Chevron* doctrine for that reason. Although the Fifth Circuit mechanically applied *Chevron* because of the presence of the two objective factors – relating to statutory ambiguity and permissibility of agency construction – the court failed to consider the additional, dispositive factor of whether the FCC interpretation allowed federal intrusion into an area traditionally regulated at the state and local level.

Under the Fifth Circuit decision, the *Chevron* canon of construction, which requires deference to agency interpretations of ambiguous statutes, trumps the federalism canon of construction, which precludes statutory interpretations that authorize federal intrusion into traditional areas of state and local regulation. This Court has held, however, that the federalism canon trumps the *Chevron* canon where the two are in conflict. *SWANCC*, 531 U.S. at 172-173; *Rapanos*, 547 U.S. at 737-738. Therefore, regardless of whether the Fifth Circuit reached the right result in construing the statute, the court employed the wrong methodology by invoking the *Chevron* doctrine in reaching this result.

CONCLUSION

This Court should reverse the Fifth Circuit decision, and hold that the *Chevron* doctrine does not apply to an agency's interpretation of its jurisdiction, if the agency's interpretation expands its authority

and reduces state and local authority to regulate subjects that are traditionally regulated by state and local governments under their police power or other authority.

Respectfully submitted,

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AMICUS CURIAE BRIEF

FOR ARGUMENT

RECORD AND BRIEFS

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BRIEF FOR PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

PCIA—The Wireless Infrastructure Association respectfully submits this brief as *amicus curiae*.

PCIA is the trade association representing the wireless telecommunications infrastructure industry. PCIA's members include the nation's leading wireless carriers and infrastructure providers. Those members develop, own, manage, and operate more

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

than 125,000 telecommunications towers and antenna structures used as sites for wireless service. Through advocacy and educational initiatives, PCIA seeks to facilitate the widespread deployment of communications networks across the country. It thus seeks to advance the Federal Communications Commission's key mission under the Telecommunications Act of 1996: "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 157 nt.

PCIA and its members have an abiding interest in this case because the Commission's order below was a major step forward for wireless broadband. It helped remove a roadblock—siting delay—that is preventing broadband service and reliable wireless voice service from reaching all Americans. The Commission's order was a paradigmatic, and proper, use of its delegated authority.

SUMMARY OF ARGUMENT

This Court does not "leave [its] common sense at the doorstep when [it] interpret[s] a statute." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989). That is why it is important to recognize that the Commission's order in this case solved a communications-infrastructure problem of national importance, in exactly the fashion Congress would have expected.

The Commission found that access to wireless broadband Internet and phone service is crucial for all Americans. It found that local siting-approval delays were blocking wireless providers from expanding their infrastructure, thus keeping reliable wireless service out of reach for many. And it found that

while Congress had tried to solve that problem by enacting 47 U.S.C. § 332(c)(7), the statute's silence on timing issues was rendering it ineffective; wireless providers could not tell when localities had "fail[ed] to act" under Section 332(c)(7)(B), and thus could not make use of the statutory provisions allowing providers to turn to courts and the Commission for relief. The Commission accordingly "use[d] its discretion to determine how best to implement [Congress's] policy[.]" *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 393 (1999).

That sort of implementation is just what Congress authorized when it instructed the Commission to "prescribe such rules and regulations as may be necessary in the public interest" to carry out the Act's provisions, 47 U.S.C. § 201(b), and to "take immediate action to accelerate deployment of [broadband] capability by removing barriers to infrastructure investment," *id.* § 1302(b). The Commission plainly had delegated authority to do what it did. And nothing in Section 332(c)(7)(A) stripped that authority away. The Court can, and should, affirm the decision below on the ground that the Commission's authority to act was clear and unambiguous.

ARGUMENT

I. THE FEDERAL COMMUNICATIONS COMMISSION'S ORDER IN THIS CASE HELPED SOLVE A PROBLEM OF NATIONAL SIGNIFICANCE.

A. Wireless Siting Delays Hamper The Broadband Rollout And Thus The U.S. Economy.

1. "Broadband," or high-speed, Internet service is not a luxury. It is vital for "economic * * * competitiveness and a better way of life." FCC, *Connecting America – The National Broadband Plan* xi (2010)

("*Broadband Plan*").[2] Broadband Internet service "can expand access to jobs and training [and] support entrepreneurship and small business growth." *Id.* at xiv. It "help[s] businesses improve internal productivity and reach customers." *Id.* at 16. It opens doors "to jobs in information and communications technology," which "is growing 50% faster than * * * other sectors." *Id.* at 3. It spurs educational improvements by giving educators and students—especially those with fewer financial resources—access to a vastly expanded array of learning tools. *Id.* at 223-227. And the buildout of the broadband network itself is a major job creator. One study demonstrated that "the investments and innovation entailed in the transition from 2G to 3G wireless technologies and Internet infrastructure spurred the creation of some 1,585,000 new jobs from April 2007 to June 2011." R. Shapiro & K. Hassett, *The Employment Effects of Advances in Internet & Wireless Technology: Evaluating the Transitions from 2G to 3G & from 3G to 4G* at 1 (Jan. 2012).[3]

The bottom line: Broadband deployment "is critical for economic development, growth, jobs, education, telemedicine and other data-centric services, and for the United States to remain competitive with other countries." C. Dingwall, *Rural Broadband: Miles to Go Before We Sleep*, WirelessWeek, July 16, 2010.[4] Congress has recognized as much. It found in 2008 that broadband "has resulted in enhanced economic

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[2] *Available at* http://download.broadband.gov/plan/national-broadband-plan.pdf

[3] *Available at* http://www.sonecon.com/docs/studies/Wireless_Technology_and_Jobs-Shapiro_Hassett-January_2012.pdf

[4] *Available at* http://www.wirelessweek.com/News/Feeds/2010/07/wireless-rural-broadband-miles-to-go-before-we-sleep

development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans." 47 U.S.C. § 1301(1). It further found that "[c]ontinued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth." *Id.* § 1301(2). And it has placed responsibility squarely on the Commission to spur that progress. The Commission is directed by statute to "ensure that all people of the United States have access to broadband capability." *Id.* § 1305(k)(2). Moreover, Congress has mandated that if the Commission finds that broadband is not being deployed to all Americans in a timely fashion, it "*shall take immediate action* to accelerate deployment of such capability *by removing barriers to infrastructure investment* and by promoting competition in the telecommunications market." *Id.* § 1302(b) (emphases added).

The nation has made great strides in recent years in making broadband available to all citizens. Yet millions of Americans still lack access to this technology. In 2011 the Commission found that as many as 26 million Americans live in areas unserved by broadband. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Seventh Broadband Progress Report & Order on Recon., 26 FCC Rcd 8008, ¶ 1 (2011). Those millions of people lack reasonable access to everything from banking services to educational opportunities to the capacity to apply for jobs. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Eighth Broadband Progress Report & Order on

Recon., 27 FCC Rcd 10342, ¶ 120 & n.280 (2012) ("*Eighth Broadband Report*").

2. Wireless networks have a central role to play in solving this problem. The Commission in 2010 announced, as one of its primary goals, that "the United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation." *Broadband Plan* at xiv. The agency made that a centerpiece of its push toward universal broadband because "[m]obile broadband"—that is, high-speed Internet provided to smartphones and other devices without the need for wireline connections—"is growing at unprecedented rates. From smartphones to app stores to e-book readers to remote patient monitoring * * * , mobile services and technologies are driving innovation and playing an increasingly important role in our lives and our economy." *Id.* at 9. As President Obama recently observed:

> Few technological developments hold as much potential to enhance America's economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet. Innovative new mobile technologies hold the promise for a virtuous cycle—millions of consumers gain faster access to more services at less cost, spurring innovation, and then a new round of consumers benefit from new services.

The White House, *Presidential Memorandum: Unleashing the Wireless Broadband Revolution*, at 1 (June 28, 2010).[5] The technology is particularly

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[5] *Available at* http://www.whitehouse.gov/the-press-office/presidentialmemorandum-unleashing-wireless-broadband-revolution

important as a tool to close the "digital divide"—the gap in Internet access and adoption rates between higher-income and lower-income Americans. Studies show that "use of wireless Internet has grown fastest amongst lower income households," in part because of the lower cost of mobile devices compared to PCs and laptops. S. Andes & D. Castro, *Opportunities & Innovations in the Mobile Broadband Economy* (Sept. 14, 2010).[6] Wireless broadband thus is "reducing the digital divide and expanding access to technology to all segments of the population." *Id.*

Of course, the importance of wireless devices goes well beyond Internet access. As of December 2011, there were 331.6 million wireless subscriber connections in the United States—an increase of nearly 100 million during the previous five years alone. CTIA, *Wireless Quick Facts* (2012).[7] The majority of those users rely on mobile phones. CNN, *Survey: U.S. Mobile Web Access Growing Fast* (July 8, 2010).[8] Indeed, "[a]s of the second half of 2011, one in three U.S. households (34%) had only wireless telephones." S. Blumberg *et al.*, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, 2010–2011*, Nat'l Health Statistics Reports No. 61 (Oct. 12, 2012).[9] That makes reliable wireless service especially important. "[C]arriers need to be able to provide a strong, high-quality signal in resi-

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[6] *Available at* http://www.itif.org/publications/opportunities-and-innovations-mobile-broadband-economy

[7] *Available at* http://www.ctia.org/media/industry_info/index.cfm/AID/10323

[8] *Available at* http://articles.cnn.com/2010-07-08/tech/mobile.internet.access.pew_1_cell-phone-users-feature-phones-mobile-internet?_s=PM:TECH

[9] *Available at* http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf

dential areas so that wireless users can be protected in case of an emergency." *Id.* Without a strong signal, users may not be able to dial 911. And without a strong signal, "E911" service—an innovation that allows first responders to identify a caller's precise location when he or she dials 911—cannot operate. For these reasons a comprehensive wireless network is more than an economic boon; it is "a crucial public safety necessity." *Id.*

3. As with any communications technology, the wireless network requires infrastructure. Wireless providers use radio transmitters and other electronic equipment to convey signals from phone to phone and from wireless devices to the Internet. To allow for clear signals over a broad coverage area, that equipment often must be placed high in the air. Sometimes that means attaching the equipment to a support structure for cellular facilities. *See Comments of PCIA—The Wireless Infrastructure Association & The DAS Forum*, WC Docket No. 11-59 at 11 (FCC July 18, 2011) ("*PCIA Broadband Comments*"). Other times it means "collocating" equipment, *i.e.*, placing it on an existing structure. *Id.* Providers sometimes collocate by adding equipment to an existing communications support structure that already hosts several other providers' equipment. *Id.* Other times, providers obtain permission to place equipment on another type of tall structure, such as a roof or water tank.

Wireless industry participants continuously explore these options (and more) in localities across the country because the need for infrastructure is vast and growing. "Both new construction of wireless antenna structures and the availability of existing structures for purposes of collocating additional

antennas have been, and will continue to be, integral to wireless buildout." *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment*, Notice of Inquiry, 26 FCC Rcd 5384 (2011). Indeed, an estimated 40,000 towers are needed to expand mobile broadband to virtually all Americans. *See* Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, Washington, D.C. (Feb. 9, 2011).[10] And that is only one facet of a much broader industry investment in new infrastructure. "Industry analysts anticipate the U.S. wireless industry as a whole will invest * * * $23 billion to $53 billion in 4G network deployment between 2012 and 2016." *Eighth Broadband Report* ¶ 33.

These sorts of infrastructure investments are, of course, necessary for wireless service to reach new markets. But they are no less critical in areas that already have service. That is so for two reasons. First, overall wireless traffic has exploded in recent years—global mobile data traffic grew *133 percent* in 2011 alone—and the growth rate shows no signs of slowing. *See Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2011–2016* at 1 (Feb. 14, 2012).[11] The only way for providers to keep up with that growth, and continue offering reliable service and high speeds, is to deploy additional infrastructure in high-use areas. Second, the industry constantly must upgrade and replace infrastructure as wireless technology advances. To offer just

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[10] *Available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf

[11] *Available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf

one example: Wireless carriers have been upgrading their networks to use "LTE," the shorthand name for a wireless communication standard that offers substantially increased capacity and speed. *See* Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, "The Global Internet at a Crossroads," at the Council on Foreign Relations, Washington, D.C., 2012 WL 5879188, at *2 (Nov. 20, 2012) (LTE "will allow us to enjoy broadband speeds on the go comparable to what we're used to from our Wi-Fi connections at home"). But LTE uses a different radio interface and different core network components than previous technologies. The LTE rollout thus requires infrastructure upgrades. Residents in a given community cannot take advantage of this exciting new technology unless and until the wireless industry can put the necessary hardware in place.

4. In short, consumers want expanded wireless access, public safety agencies need it, and providers stand ready to offer it. But there is a logjam in this otherwise robust market: localities' sometimes lengthy delays in granting siting approvals.

Wireless providers seeking to upgrade existing facilities, build new tower-mounted facilities, or collocate their facilities on existing structures typically must obtain zoning approvals, use permits, or other siting authorizations from the relevant locality. *See, e.g.*, *PCIA Broadband Comments* 18-19; *ATC Realty, LLC* v. *Town of Kingston*, 303 F.3d 91, 93 (1st Cir. 2002). Some localities process those requests efficiently. Others, however, do not. As a result, "personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications"—

delays that the Commission found were "impeding the deployment of advanced and emergency services." Pet. App. 97a.

These delays are sometimes egregious. Evidence before the Commission indicated that at the time the proceeding began, there were "more than 3,300 pending personal wireless service facility siting applications before local jurisdictions. Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years*." Pet. App. 98a (emphasis in original).

That is an extraordinary delay for any approval. But the evidence also demonstrated that "almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years." Pet. App. 98a. That is particularly unreasonable because "collocation involves simply sharing an existing facility rather than building a new one. * * * There is no legitimate local interest in taking a year—much less three—to decide a collocation application." CTIA Br. in Opposition 6 n.5. Indeed, the evidence before the agency indicated that efficient localities process collocation applications in as little as a week. *Petition for Declaratory Ruling* 16, WT Docket No. 08-165 (FCC July 11, 2008). That means some wireless providers wait more than *150 times* longer than others for approval simply to modify an existing facility, or to place additional radio equipment at a location where other facilities are already installed.

The Commission received evidence that delays were widespread. One provider reported that "the

typical processing times for personal wireless service facility siting applications range from 28 to 36 months in several California communities." Pet. App. 98a. Another reported that "in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months." *Id.* 99a. A third showed that it was experiencing "delays of 10 to 25 months for its proposals to place facilities in public rights-of-way"—even when all it wanted to do was replace old equipment. *Id.*

For localities with existing wireless coverage, siting delays can mean inability to take advantage of new high-speed technologies like LTE. Delays can also mean persistent gaps in coverage and dropped calls—including emergency calls. But for localities *without* existing coverage, those same delays keep residents in the dark altogether. In Montana, for example, a cell tower company sought approval to build a tower along a highway so a provider could offer service to the town of Ovando. C. Moy, *Cell tower rejected at Trixi's Antler Saloon; no service for Ovando*, The Missoulian, Mar. 13, 2010.[12] But "[d]ebate over the proposed tower * * * r[a]n nonstop for over two years." *Id.* With no end in sight, a company representative suggested he was giving up: "It's been going on for so long now that there's not the feeling of urgency that there was two years ago[.] * * * People have started * * * pursuing other opportunities." *Id.* Meanwhile, the town remained without any wireless broadband—or even cell phone—coverage. One resident said she had "no doubt that

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[12] *Available at* http://missoulian.com/news/local/article_81eb56ce-2e6d-11df-8093-001cc4c002e0.html

cell phone service in the Ovando area is inevitable." *Id.* The question was when.

Nor are these sorts of problems new. The Commission observed in rules issued to implement the Telecommunications Act that "zoning approval for new wireless facilities is * * * a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10,785, 10,833 ¶ 90 (1997). That observation is now nearly 16 years old. And yet the Commission's findings in this proceeding make clear that not much had changed.

B. Section 332(c)(7)(B)'s Silence On Timing Issues Was Allowing Siting Delays To Persist.

Localities do not have free rein to sit on wireless siting applications indefinitely or to arbitrarily deny permit requests. Section 332(c)(7) forbids any state or local government from "prohibit[ing] or * * * effect[ively] * * * prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II). It requires localities to respond to wireless siting requests "within a reasonable period of time * * * taking into account the nature and scope of such request." *Id.* § 332(c)(7)(B)(ii). It limits their discretion to deny requests, providing that a locality may not issue a denial "on the basis of the environmental effects of radio frequency emissions" so long as the provider is complying with Commission regulations on that subject. *Id.* § 332(c)(7)(B)(iv). And it gives these new safeguards teeth by making them enforceable in federal court: "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality

thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v).

Congress added these provisions to the Telecommunications Act of 1996 to spur competition and kick-start the nation's wireless buildout. *See City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). Section 332(c)(7)'s legislative history demonstrates that Congress was concerned about the "inconsistent and, at times, conflicting patchwork" of state and local zoning requirements, believing that this patchwork threatened "the deployment" of wireless communications. H.R. Rep. No. 104-204, pt. 1 at 94 (1995). Congress thus created a statutory framework that would "speed deployment and the availability of competitive wireless telecommunications services which ultimately w[ould] provide consumers with lower costs as well as with a greater range and options for such services." *Id.* As this Court has observed, Section 332(c)(7)(B)'s primary purpose was to "reduc[e] * * * the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes*, 544 U.S. at 128.

The safeguards, however, proved insufficient to ward off delay. The petition that launched the proceeding now on review identified one reason why: The statute lacked specifics regarding what constituted a "reasonable time" for action on an application, 47 U.S.C. § 332(c)(7)(B)(ii), and what constituted a locality's "failure to act," *id.* § 332(c)(7)(B)(v). *See* Pet. App. 93a. Absent details on what those terms mean, localities could spend months or even

years shuttling a siting application through various application and hearing processes, and providers would be hard-pressed to obtain relief. They had no way to know when a "reasonable time" had elapsed and when the locality had failed to act. And conversely, "an aggrieved party wishing to challenge a State or local government's failure to act could miss the 30-day statute of limitations through no fault of its own." Pet. App. 93a. Indeed, even where a locality was holding up a siting application for obviously unlawful (and preempted) reasons such as debunked emissions concerns—a not uncommon occurrence[13]—wireless providers could have trouble remedying the delay. After all, Section 332(c)(7) provided no guidance on when the locality's intransigence ripened into a "failure to act." 47 U.S.C. § 332(c)(7)(B)(v). And without action or a failure to act, the statute's remedies were not triggered.

C. The Commission's Action Alleviated Siting Delays By Implementing The Act.

1. Alerted to the adverse effects this statutory silence was producing, the Commission took action. It requested public comments in 2008 and received hundreds of them, with "[i]ndustry commenters generally support[ing] the Petition in all respects." Pet. App. 79a. It found that "[w]ireless services are central to the economic, civic, and social lives of over 270 million Americans" and that "[w]ithout access to mobile wireless networks * * * consumers cannot

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[13] *See, e.g.*, B. Sandrick, *Parma officials uncertain about future of cell phone antennae placement*, Parma Sun Post, Apr. 7, 2010 (Ohio locality "tabled" a provider's plan to collocate radio antennae on a roof, expressing concern about 'radiation coming from the antennae"). *Available at* http://blog.cleveland.com/parmasunpost/2010/04/parma_officials_uncertain_abou.html

receive voice and broadband services from providers." *Id.* 71a. It found "that the record shows that unreasonable delays" in local processing of siting requests "are occurring in a significant number of cases." *Id.* 98a. And it found that "[d]elays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion." *Id.* 102a.

In a carefully constrained decision, the Commission determined to "lend clarity" to the statutory terms by "interpreting the limits Congress already imposed on State and local governments." *Id.* 111a, 90a. The Commission decided that delays longer than 90 days to process collocation requests and 150 days to process other siting requests were presumptively "unreasonable" under Section 332(c)(7)(B)(ii), and that when a locality did not act within those times frames it had "failed to act" under Section 332(7)(B)(v). *Id.* 115a. Those determinations gave the wireless industry clarity, for the first time, about what Section 332(c)(7)(B) means. The Commission recognized as much. It observed that "because an 'action or failure to act' is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on an application." *Id.* 106a. And yet by establishing presumptive as opposed to hard-and-fast deadlines, the Commission left the courts wide latitude in determining whether delays beyond the presumptive deadlines are reasonable under the facts of a specific case.

2. The Commission's action helped solve a problem of national significance. And it did so by doing precisely what agencies are *supposed* to do: It "use[d] its discretion to determine how best to implement [Congress's] policy in those cases not covered by the statute's specific terms." *Haggar Apparel*, 526 U.S. at 393. That is what Congress had in mind when it broadly authorized the Commission to "execute and enforce the provisions" of the Communications Act, 47 U.S.C. § 151, to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act," *id.* § 201(b); *accord* §§ 154(i), 303(r), and to "encourag[e] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment," *id.* § 157 nt. The Commission acted consistently with the goals Congress set for it in 47 U.S.C. § 157 nt. when it invoked its general authority under other provisions to interpret and give effect to Section 332(c)(7)(B).

II. THE COMMISSION CLEARLY HAD AUTHORITY TO ISSUE THE RULING UNDER REVIEW.

For the reasons above, the Commission acted well within its delegated authority in issuing its ruling in this case. The only question is whether something in Section 332(c)(7) stripped away that delegated authority. The answer is no. There was no jurisdictional ambiguity for the Commission to resolve. The Court can and should affirm the decision below without resolving the *Chevron* question at the heart of Petitioners' argument.

A. The Commission Has Authority To Interpret The Communications Act, And Nothing In Section 332(c)(7) Withdrew That Authority.

1. Congress delegated to the Commission the authority to "execute and enforce" the Communications Act, 47 U.S.C. § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, *id.* § 201(b). In *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), this Court addressed the reach of Section 201(b). It explained that that provision gives the Commission jurisdiction over all matters that are within the "substantive reach" of the Communications Act. *Id.* at 380. Thus any "expansion of the substantive scope of the [Communications] Act" necessarily means a "*pari passu* expansion of Commission jurisdiction"; whatever Congress adds to the Communications Act, the Commission may implement. *Id.* That includes the provisions of the Telecommunications Act of 1996, the Court explained, because "Congress expressly directed that the 1996 Act * * * be inserted into the Communications Act of 1934." *Id.* at 377.

Section 332(c)(7) was enacted as part of the Telecommunications Act of 1996. That means Section 332(c)(7) is now part and parcel of the Communications Act. And that in turn means, under *Iowa Utilities Board*, that Section 332(c)(7) is within the Commission's jurisdiction. As with all Communications Act provisions within the Commission's jurisdiction, " 'Congress would expect the agency to be able to speak with the force of law when it * * * fills a space in the enacted law.' " *Global Crossing Telecommc'ns, Inc.* v. *Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 57 (2007) (quoting *United States*

v. *Mead Corp.*, 533 U.S. 218, 229 (2001)). That is just what the Commission did. The agency's interpretative exercise was within its authority unless something else in the Act withdrew that authority from it.

2. Petitioners say that that "something else" is Section 332(c)(7)(A). They overread the provision.

Subsection 332(c)(7)(A) is part of the same paragraph as the provisions discussed above—those mandating that localities process siting applications in a reasonable time. It states that "[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). There is nothing ambiguous about that language. The "except as provided in this paragraph" clause means by necessary implication that the provisions of Section 332(c)(7), including the "reasonable time" limitation, *can* limit localities' siting authority, and it says nothing to limit the Commission's administrative authority. Absent more, the Commission would be able to interpret and enforce Section 332(c)(7). Petitioners' argument therefore must rest on the "nothing in this Act" clause. But that clause speaks only to the rest of the Act *outside* of Section 332(c)(7). It says nothing at all about, and imposes no limits on, what the Commission may do under the auspices of Section 332(c)(7) itself.

The Commission's usual authority to interpret the Communications Act thus stands unimpeded; it may implement Section 332(c)(7)(B)'s new restrictions on local siting authority. The import of Section

332(c)(7)(A), as the court below correctly recognized, is merely that the Commission would not have been able to "impos[e] restrictions or limitations that *cannot* be tied to the language of [Section] 332(c)(7)(B)." Pet. App. 41a (emphasis added). The Commission made no attempt to do so. Section 332(c)(7)(A) is not triggered.

B. When Congress Intends To Withdraw The Commission's Authority, It Does So Clearly.

The Commission's authority to issue its ruling in this proceeding is clear on the face of Section 332(c)(7). But if further confirmation were needed, a comparison to Section 2(b) of the Communications Act provides it. That provision states that, with certain exceptions, "nothing in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to" certain matters that are reserved to the states. 47 U.S.C. § 152(b) (emphasis added). The italicized language restricts both the reach of the Act *and* the Commission's jurisdiction. In other words, it does exactly what Petitioners want Section 332(c)(7)(A) to do. And yet the difference in the statutory language is striking: Section 2(b) limits the Commission's jurisdiction expressly, while Section 332(c)(7) says nothing about the Commission at all.

"The contrast between these two paragraphs makes clear that Congress knows how to impose express limits" on the Commission's authority to implement the Communications Act when it wants to do so. *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). Congress's failure to impose those same limits in Section 332(c)(7)(A) is fatal to Petitioners' case. After all, "when Congress includes

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). The Court should reject Petitioners' effort to import jurisdiction-stripping language into a provision that clearly lacks it.[14]

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[14] Other congressional enactments similarly suggest that Congress did not intend to divest the Commission of authority to interpret Section 332(c)(7)(B). For example, Congress recently provided that localities must approve requests for collocation and infrastructure replacement "that do[ ] not substantially change the physical dimensions" of the structure—and Congress gave the Commission authority to enforce that provision. Pub. L. No. 112-96, §§ 6003(a), 6409. As the government points out in its merits brief (at 43 n.13), it is difficult to imagine why Congress would have wanted the Commission to have this authority and yet to be completely excluded from authority over the closely related requirements of Section 332(c)(7)(B).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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December 26, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

In The
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, et al.,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE SOUTHERN COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether separation of powers principles preclude courts from affording *Chevron* deference to an agency's determination of its own jurisdiction.

RULE 29.6 STATEMENT

Amicus curiae Southern Company has no parent corporations, and no publicly traded company owns 10% or more of the shares of the Southern Company's stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Southern Company is one of America's leading electricity producers, delivering affordable and reliable energy to more than 4.4 million customers through its operating companies, including the Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively "Southern Company"). Nearly every aspect of the Southern Company's operations is regulated at the federal or state level. At the federal level, the Southern Company system is subject to regulation by, *inter alia*, the U.S. Environmental Protection Agency ("EPA") pursuant to the Clean Air Act and Federal Water Pollution Control Act, the Federal Communications Commission pursuant to the Pole Attachments Act, and the Federal Energy Regulatory Commission pursuant to the Federal Power Act. At the same time, the Southern Company is a regulated public utility, subject to intensive oversight and scrutiny by public service commissions and other state agencies.

The Southern Company's experience is that administrative agencies tend to take a more expansive view of their powers than Congress ever clearly

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amicus* and its counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief. Letters reflecting their consent are filed with the Clerk.

intended to delegate to them, creating significant regulatory uncertainties that impair investment and present significant operational difficulties. The Southern Company thus strongly believes that deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inappropriate to federal agencies' determination of the limits of their powers. Congress's delegation of authority, as determined *de novo* by the judiciary, and not an agency's own view as to the limits of its authority, should govern.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Chevron held that reviewing courts should defer to an agency's interpretation of a statute Congress intended it to administer. Since that decision, the Court has carefully distinguished between situations where judicial deference to agency action furthers Congress's purposes in implementing statutory schemes, such as through the enactment of legislative rules to administer statutory programs where there is no question of jurisdiction, *see Chevron*, 467 U.S. at 843-44, and those where deference disserves Congress's intent or calls into question the appropriate balance of powers among the coordinate branches of government, such as where an agency promulgates a vague regulation and then demands deference in its interpretation and application of that regulation, *see Talk America, Inc. v. Michigan Bell Telephone Co.*,

131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The Court is now faced with the question of whether an agency's determination of its jurisdiction merits deference under *Chevron*. It does not.

Given the prominence that administrative agencies have assumed in the everyday governance of the United States, judicial review of their decisions should further the separation of powers principles underlying our constitutional system. Deference to an agency's view of its own jurisdiction frustrates the orderly development and predictability of the law while promoting arbitrary government. *Cf. Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring) (discussing constitutional concerns with deferring to an agency's interpretation of its own regulations). This is because, unlike discretion inherent in congressional grants of regulatory authority, *see Chevron*, 467 U.S. at 843-44, allowing agencies both to determine the limits of their power, and then to exercise that power, impermissibly unites legislative and executive functions in the same body. This result is contrary to the fundamental separation of power principles on which our constitutional democracy is founded. *See Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

In particular, permitting agencies to determine the limits of their own jurisdiction, by affording those determinations *Chevron* deference, undercuts the principle of political accountability that the separation of powers was intended to further. *Chevron* deference necessarily implies a protean administrative power

than can be changed and extended within the realm of statutory silence, subject only to the procedural safeguards contained in the Administrative Procedure Act and certain organic statutes. As such, a decision deferring to an agency's extension of its own jurisdiction would excuse the political branches from their responsibility to address new challenges through constitutionally-prescribed processes, exalting existing administrative authorities that may or may not be well suited to meet those challenges.

Furthermore, as a doctrinal matter, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). In deciding the initial question of whether or not Congress actually delegated authority – that is, jurisdiction – deference under *Chevron* would be illogical and unwarranted as it presumes the very delegation that justifies *Chevron* deference in the first place. It necessarily follows that *Chevron*'s rationale does not support deferring to agency jurisdictional determinations; if anything, *Chevron* suggests that the courts must police the limits of agency power even more strictly, in view of the broad discretion agencies enjoy over matters within their authority.

Beyond constitutional principles, a presumption against deference to agency jurisdictional determinations will further both accountability and clarity in the law, helping to delineate between the areas within and without agencies' jurisdiction.

To be sure, deference is not an all or nothing proposition. A general rule declining *Chevron* deference for jurisdictional determinations will not preclude reviewing courts from honoring any relevant expertise that an agency may bring to bear on questions of its jurisdiction. This Court has long held that courts should defer to agency arguments with the "power to persuade," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and an agency will have ample opportunity to thoroughly consider jurisdictional issues and to present a reasoned and thorough legal basis for its conclusions.

For these reasons, and those discussed below, the Court should hold that *Chevron* deference is inapplicable to agencies' jurisdictional determinations, and should remand the instant case for proceedings consistent with its decision.

ARGUMENT

I. Affording *Chevron* Deference to an Agency's Determination of Its Own Jurisdiction Undermines the Constitutional Separation of Powers and Is Inconsistent with *Chevron*'s Doctrinal Basis

1. "Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are

awash in agency 'expertise.'" Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516-17. Given the prominence that administrative agencies have assumed in the everyday governance of the United States, any principled framework for judicial review of their actions must take into account administrative agencies' place in our constitutional structure.

First, courts reviewing agency action must ensure that Congress has not impermissibly delegated its own legislative powers to administrative agencies. This is the case because the United States Constitution vests "[a]ll legislative powers herein granted . . . in a Congress of the United States," U.S. Const. art. I, § 1, and, "[s]trictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting). Instead, "[t]he whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action." *Id.* at 417 (Scalia, J., dissenting). As the *legislative* branch, "it is up to Congress, by the relative specificity or generality of its statutory commands, to determine – up to a point – how small or how large that degree shall be." *Id.*

This Court has upheld statutes allowing the Executive Branch and independent agencies to exercise significant discretion so long as the exercise of

that discretion is guided by an "intelligible principle," *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-75 (2001), and it has required that "the degree of discretion that is acceptable varies according to the scope of *the power congressionally conferred*," *id.* at 475 (emphasis added). It is unquestionably *Congress* that must "lay down by legislative act an intelligible principle," not the agency. *Id.* at 472 (internal quotation marks omitted).

But if administrative agencies are afforded *Chevron* deference when reviewing their own conclusions on what power Congress has conferred, courts may be unable to determine whether the delegation is constitutionally permissible in the first place. This is because, in the event of an excess delegation, the agency could cure the unlawfulness "by adopting in its discretion a limiting construction of the statute" that is also reasonable – a practice this Court has expressly disclaimed. *See Whitman*, 531 U.S. at 472.

And in light of the vesting of legislative power in Congress, not the Executive Branch (and certainly not independent agencies), it furthers our constitutional values to "create at least a rebuttable presumption that Congress has not delegated an agency authority to determine the scope of its own jurisdiction." *See* Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1539. Otherwise, there would be no effective check on agency determinations of their jurisdiction: "If an ambiguity, let alone a statutory silence, is sufficient

to trigger *Chevron* deference, an ambiguous statute may become license for an agency to control the scope of its own authority, and perhaps even the ability to create regulatory authority where no such authority legitimately existed." *Id.*

Second, in reviewing Congress's delegation of authority to an administrative agency, courts must guard against the inappropriate commingling of authority that is properly distributed among the three branches of government. "In designing [the constitutional structure], the Framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document." *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting). The Framers were, in fact, well aware that "'[w]hen the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'" *The Federalist No. 47*, p. 224 (Hallowell, ed., 1842) (J. Madison) (quoting Montesquieu, *Spirit of the Laws* bk. XI, ch. 6)).

Thus, *Chevron* deference in the face of statutory ambiguity is generally warranted because it "does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). That is only because "[t]he legislative and executive functions are not combined" and Congress "has no control over

[ ] implementation" but through "more precise[ ] legislation." *Id.* But an agency goes too far where it seeks to exercise both legislative and executive functions, claiming sole authority to establish rules, interpret those rules, and then enforce them. In that case, deference is inappropriate. *See id.*

Affording *Chevron* deference to agency jurisdictional determinations risks a similar aggrandizement of Executive authority. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).[2] There is a well-recognized and ever-present tendency for administrative agencies to enlarge their jurisdictions as a result of fundamental and unavoidable self-interest. *See generally* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203 (2004). "Not only do [agencies] propose solutions to commonly recognized social problems, but they also sometimes

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[2] Congress could not, of course, exercise the discretion to interpret statutes after it has enacted them. "When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation)." *Talk America, Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring). That is because "the constitutional power granted to Congress to legislate is granted only if it is exercised in the form of voting on specific statutes." Max Radin, *A Case Study in Statutory Interpretation:* Western Union Co. v. Lenroot, 33 Cal. L. Rev. 219, 224 (1945), *quoted in* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 375 (2012).

seek to persuade the public that there is a problem that needs solving in the first place." Sales & Adler, *supra*, at 1554. By contrast, in policing the limits of agency authority, the Judiciary has no special incentive toward aggrandizement beyond that which exists in any justiciable controversy – and perhaps less, because such disputes concern, at base, the apportionment of authority between the Legislative and Executive Branches, and not the Judicial Branch. Moreover, *Chevron* deference is a departure from the general presumption that "[i]t is emphatically the duty of the Judicial Department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and should therefore be afforded only where there is a strong inference that Congress intended that this default rule be displaced.

In sum, the presumption that Congress does not intend courts to defer to administrative agencies' interpretations of their jurisdiction is a vital guard against a commingling of powers and agency self-aggrandizement.

Third, denying *Chevron* deference to an agency's determination of its own jurisdiction furthers political accountability through the separation of powers. In enacting a statute and entrusting its administration to an administrative agency, the political branches have done no more than demonstrate the views of

an individual Congress and President.[3] "But the separation of powers does not depend on the views of individual Presidents" or Congresses. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010). Instead, where power is "diffuse[ed]" away from the political branches to an administrative agency, there is a commensurate "diffusion of accountability." *Id.* at 3155. "Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Id.* at 3155 (quoting *The Federalist No. 70* (A. Hamilton)).

Inherent in the judicial presumption of *Chevron* deference is the implicit understanding that agencies have the authority to interpret and reinterpret ambiguous statutes, consistent with their statutory mandates. This is the case even for revision to "an agency interpretation of longstanding duration," as under *Chevron*, "the agency is free to move from one to another, so long as the most recent interpretation is reasonable." *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and concurring in the judgment).

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[3] Or an individual Congress alone, if the legislation was enacted over a Presidential veto. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

While *Chevron* deference to an agency's changed statutory interpretations may be justified where there is no question that the statute in question is one that the agency is charged to administer, the agency acts with the level of formality required by the Court's jurisprudence for *Chevron* deference, *see United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), and the agency's longstanding position was not an implicit assumption that the statute is, in fact, unambiguous, *see, e.g.*, *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983), applying that degree of deference to an agency's determination of its jurisdiction frustrates political accountability in addressing new challenges that arise long after Congress has legislated and that are not clearly within an existing agency's ambit.

As time passes and new policy challenges arise, it is incumbent on the institutions of government created by the U.S. Constitution to address them or to determine that they ought not to be addressed. One might even say that the key attribute of our constitutional system is to ensure that such action is supported by the representatives of a majority of the American people (the House of Representatives), those of a majority of the States (the Senate), and a coordinate branch of government also accountable to the citizenry (the President).

It is wholly appropriate for an agency to exercise jurisdiction that a prior Congress and President have unquestionably granted. But in many cases, the inevitable outcome of affording *Chevron* deference to

agency determinations of its jurisdiction is to allow the political branches to avoid their obligation to make difficult choices by enacting new statutes in favor of agency action under old statutes. This problem is particularly acute where it is an independent agency asserting jurisdiction, as political accountability is then especially attenuated.

Chevron helps ensure that courts do not "ossify" an agency's ability to act within the scope of its delegation. But our constitutional principles are best served when action to expand agency jurisdiction is held not to a heightened legal standard but to the same one that all other legislative action is held – a judicial decision on what Congress actually legislated, based on the best reading of the text of the statute.[4] By contrast, affording agencies deference on the scope of their own authority removes new challenges from the constitutionally-prescribed political process, short-circuiting the safeguards of the separation of powers and democratic accountability.

2. Beyond undermining constitutional principles, deferring to an agency's determination of its jurisdiction is inconsistent with the doctrinal basis of *Chevron* itself. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit*, 494 U.S. at 649; *see also*

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[4] Courts reviewing agency action should, of course, give due consideration to any special expertise that an agency brings to bear on the question.

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996). Because *Chevron* deference is justified by a congressional delegation of administrative authority, affording deference to an agency's determination of its jurisdiction – to the very question of whether a congressional delegation of authority exists – puts the cart before the horse.

While "Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, *de novo*, by the court," *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., dissenting), Congress also likely would not have expected that the fox would guard the henhouse. Instead, it is consistent with the doctrine underlying *Chevron* for reviewing courts to determine whether a question of statutory construction is or is not jurisdictional. If the question is jurisdictional, then the Court should not defer; if the question is not jurisdictional, then the Court should normally defer under *Chevron*.

II. Denying *Chevron* Deference to Agency's Jurisdictional Determinations Is Consistent with Sound Principles of Statutory Interpretation

Concerns have been raised about whether and how courts and agencies reasonably may distinguish between jurisdictional and non-jurisdictional provisions, but this distinction is not different in kind from others that the courts routinely draw. Similarly,

the appropriateness of confining *Chevron* to non-jurisdictional agency determinations is sharply highlighted by the fact that it would be impossible to defer to agency decisions under *Chevron* in many situations due to the possibility of overlapping jurisdictions. Finally, a decision that *Chevron* deference does not apply to agency jurisdiction would not preclude all deference; the application of *Skidmore* deference would still allow agencies to exercise the expertise they bring to such questions, while promoting greater clarity and certainty in the law.

1. Some have suggested that "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority," and that "[v]irtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'" *Mississippi Power & Light Co.*, 487 U.S. at 381 (Scalia, J., dissenting). But while potentially difficult in some cases, these questions are not fundamentally different from other difficult questions courts regularly do answer. Indeed, determining whether a statutory provision speaks to agency jurisdiction is no more complex than distinguishing provisions that concern the jurisdiction of the courts.

While "'[j]urisdiction,' it has been observed, 'is a word of many, too many meanings,'" in this context it means power, and the Court has regularly held that courts must identify and decide the question of their own power to decide a particular case at its outset, regardless of whether there may be an "easier" way to

resolve the matter. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90, 93-94 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). In enforcing this duty, the Court has carefully distinguished between jurisdictional and non-jurisdictional matters at a very specific "level of generality," such that it is now the rare case where jurisdictional and merits issues are confused. *See Steel Co.*, 523 U.S. at 89-91; *see also* Sales & Adler, *supra*, at 1508-09.

Nor should courts have much difficulty distinguishing questions of agency jurisdiction from those regarding the substance of agency action. For example, in the decision under review, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), the FCC order at issue interpreted 47 U.S.C. § 332, which in relevant part was designed to preserve local zoning jurisdiction over cell phone towers subject to certain limits. By acting to prescribe rules in an area where the Telecommunications Act of 1996 spoke to the preservation of state and local authority, there can be little doubt that the FCC was making a determination of its jurisdiction.[5]

2. The problems with applying *Chevron* deference to agency jurisdictional determinations are

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[5] None of this is to say that the FCC's action is necessarily contrary to law, simply that a court should determine if that action is contrary to law without the application of *Chevron* deference in the face of statutory ambiguity, if any.

demonstrated by the fact that, in a significant number of cases, multiple agencies have a colorable claim of authority over a particular subject or issue. Take, for example, the current dispute between the Federal Energy Regulatory Commission ("FERC") and the Commodities Future Trading Commission ("CFTC") over alleged market manipulation in natural gas futures trading. *See Hunter v. FERC*, No. 11-1477 (D.C. Cir.) (filed Dec. 12, 2011). In that case, the CFTC and FERC are litigating which agency has jurisdiction – the CFTC pursuant to an assertion of exclusive jurisdiction under the Commodities Exchange Act § 2(a)(1)(A), 7 U.S.C. § 2(a)(1)(A), or FERC pursuant to § 315 of the Energy Policy Act of 2005, 15 U.S.C. § 717c-1, which amended the Natural Gas Act to prohibit market manipulation and to grant FERC certain (and contested) powers. *See also Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (per curiam) (dispute over whether the Secretary of Labor or the Occupational Safety and Health Review Commission had jurisdiction to maintain citations for alleged violations of the Occupational Safety and Health Act).

Taking each case in isolation and deferring under *Chevron* to each agency's determination, a reviewing court could well conclude that the CFTC has exclusive jurisdiction over energy futures market manipulation on a CFTC-regulated exchange but that FERC also has jurisdiction over natural gas futures market manipulation. But that conclusion cannot be correct. Adjudicating the agencies' dispute will necessarily

involve going beyond *Chevron* deference to ascertain Congress's intentions as to these feuding agencies' powers.

The fact that many agency jurisdictional determinations do not overlap is no answer to this fundamental problem. In *Hunter*, for example, the plain text of neither statute precludes deference to either the CFTC or FERC. Nor does the Court typically consider the enactments of a subsequent Congress to implicitly abrogate or limit those of a prior Congress. *See Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007); *but see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Instead, the conflict in *Hunter* presents a concrete example of how a presumption favoring *Chevron* deference in review of agency determinations of their jurisdiction is unwarranted and may be problematic in its consequences.

3. Denying *Chevron* deference to agency jurisdictional determinations will not deprive either the courts or the public of useful agency expertise. A decision that *Chevron* deference does not apply merely clarifies the legal standard that a court will use in determining whether or not to affirm an action under review; in no case does it necessarily mean that an agency assertion of jurisdiction will or will not be upheld. Instead, the reviewing court will simply apply the standard canons of statutory construction in ascertaining Congress's intent. In so doing, the court would apply *Skidmore* deference to the agency's determination, in which "[t]he fair measure of deference to an agency administering its own statute . . .

var[ies] with circumstances," such as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 139-40).

While the application of *Skidmore* deference has been criticized as "indeterminate," *see Mead*, 533 U.S. at 239 (Scalia, J., dissenting), there is ample reason to believe that it is appropriate in the case of agency jurisdictional determinations. It will allow reviewing courts to take into account the agency's expertise and rationale for exercising jurisdiction in determining whether that exercise is consistent with an ambiguous delegation from Congress. At the same time, however, the courts will be the final arbiters of these decisions, setting firm lines on agency jurisdiction that further regulatory certainty and other important legal values.

CONCLUSION

Given the prominent role that administrative agencies play in the everyday governance, but their uncertain place in our constitutional structure, the Court should be wary of a legal standard that would allow agencies to increase the scope of their discretion without legislative action and would undermine political accountability. And as a doctrinal matter, affording agency determinations of their jurisdiction *Chevron* deference is circular because it presupposes

the very delegation of authority that would merit such deference.

For these reasons and those discussed herein, the Court should hold that courts do not defer under *Chevron* when reviewing an agency's determination of its own jurisdiction and should remand these consolidated actions for proceedings consistent with that decision.

Respectfully submitted,

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Dated: November 2012

AMICUS CURIAE BRIEF

Nos. 11-1545 and 11-1547

IN THE

Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, *et al.*,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* T-MOBILE USA, INC. AND THE COMPETITIVE CARRIERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

T-Mobile USA, Inc. ("T-Mobile") is a national provider of wireless voice, messaging, and data services to over 33 million subscribers. It provides its services through a cellular radio telephone network comprised of more than 50,000 cell sites (*e.g.*, cell phone towers), switching facilities and other network elements. The federal government licenses blocks of radio frequency spectrum to wireless carriers like T-Mobile. This spectrum is used to provide wireless telecommunications services to customers through cell sites. The location, construction and modification of cell sites are subject to limited state or local permitting authority.

The Competitive Carriers Association ("CCA"), initially founded in 1992 by rural and regional wireless carriers, is now the nation's leading association for competitive wireless providers serving all areas of the United States. Today, the licensed service area of CCA's over 100 carrier members covers more than 95 percent of the nation, which depends on the cell towers and other cell sites permitted by state and local authorities consistent with the Telecommunications Act of 1996.

The interest of *amici* arises from the necessity of obtaining wireless siting approval from state and local authorities, and the need for a fair, reasonable

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[1] By a filing dated November 6, 2012, all parties have consented to the filing of *amici curiae* briefs supporting either party. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

and timely process in aid of expanding and improving the national wireless infrastructure. T-Mobile and CCA's other carrier members generally must obtain state or local zoning approval before building or improving cell sites. Because the failure to act on a request for approval within a reasonable time, or at all, operates as an effective denial, *amici* have a strong interest in prompt decisions on wireless siting applications. In response to delays in receiving those decisions, to ensure reasonably timely local action on such requests, *amici* urged Congress to enact what is now § 332(c)(7) of the Communications Act. Through their participation in the administrative proceeding below, *amici* supported the Federal Communications Commission's adoption of the Declaratory Ruling challenged by petitioners and their *amici*.

SUMMARY OF THE ARGUMENT

At least eight decisions of this Court assessing challenges to agency jurisdiction to issue gap-filling interpretive guidance – including at least three involving the Federal Communications Commission ("FCC" or "Commission") – have agreed that even where agency jurisdiction is at issue, considerable deference is owed to the construction of a statute by those charged with its execution. Deference to agency jurisdictional decisions is warranted particularly where the agency is working at the narrow end of the spectrum of agency authority – where it is working interstitially to provide interpretive guidance concerning particular words or phrases, in the heartland of agency authority. *See, e.g., Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Deference on jurisdictional issues may be

appropriate under other circumstances as well, but it is particularly warranted here given the limited nature of the FCC's assertion of jurisdiction.

In assessing whether Congress has delegated power to administer a challenged statute, particularly in FCC cases, the Court has consistently looked to the broad authority Congress has delegated. It has then turned to the more specific provisions at issue only to ask whether the power to administer otherwise granted has been displaced. By focusing on 47 U.S.C. § 332(c)(7) in the first instance, and ignoring 47 U.S.C. §§ 201(b), 151, 154(i), and 303(r), petitioners and their *amici* depart from this Court's consistent approach.

No act of Congress and no authority from this Court direct courts to narrow the jurisdiction otherwise afforded by Congress simply because the interpretive guidance being offered arguably affects state authority. The very nature of the jurisdiction afforded the FCC necessarily entails the power to reduce "impediments imposed by local governments upon the installation of facilities for wireless communications," and that was precisely the means Congress employed in enacting §332. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). The decision to leave local authorities with the power to make local siting decisions – and thus the decision to prevent the Commission from preempting that local power altogether – reflected no withdrawal of the Commission's usual power to provide interstitial interpretive guidance about the lines that Congress itself drew. The FCC's ruling at issue here added no new federal limitations, but simply provided greater clarity with respect to the line Congress drew, which the Commission, because of its expertise and fact-

finding capacities, was far better suited than courts to do.

Although either statutory text or legislative history might properly counsel against deferring to an agency's delegated gap-filling authority in any given case, neither supports the petitioners here.

ARGUMENT

DEFERENCE TO AN AGENCY'S DETERMINATION OF ITS INTERPRETIVE JURISDICTION IS APPROPRIATE WHERE CONGRESS HAS DELEGATED GAP-FILLING AUTHORITY TO THE AGENCY WHICH USES THAT AUTHORITY IN AREAS OF CORE COMPETENCE CONSISTENT WITH STATUTORY ENACTMENTS.

A. *CHEVRON* DEFERENCE APPLIES WHEN CONGRESS INTENDS TO DELEGATE AUTHORITY TO AN AGENCY TO INTERPRET EXISTING STATUTORY LIMITATIONS.

The Court has long recognized that many statutes enacted by Congress do not anticipate and resolve all the issues that may arise with exact precision, and that an agency's interpretive guidance for those statutes is entitled to judicial deference where Congress clothed the agency with the authority to interpret or administer the statute. As Justice Stevens's influential opinion for the Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) held, "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'" (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

Chevron held that a reviewing court should defer to an agency's interpretation of the statute it administers when the statute contains ambiguities or gaps (*Chevron* Step 1), and if the agency's interpretation is "a permissible construction of the statute" (*Chevron* Step 2). *Chevron*, 467 U.S. at 842-43.

As the doctrine's rationale and classic formulation make plain, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

Thus, before a reviewing court engages in a *Chevron* analysis of an agency's challenged statutory interpretation, the court must initially ascertain that the agency does administer the statute at issue, so as to ensure that it possesses the necessary "interpretive jurisdiction" to clarify statutory ambiguities or fill in gaps. This initial determination of interpretive jurisdiction is referred to, by petitioners and others, as "*Chevron* Step 0." *See* City of Arlington Pet. Br. 16-17; *see generally* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).

In enacting the 1996 Act, a pro-competitive and deregulatory statute, Congress knew that state and local governments sometimes hindered the rapid deployment of new telecommunications services by delaying consideration of or denying cell site permit applications. To that end, Congress enacted specific limitations on state and local regulatory authority over wireless facilities in 47 U.S.C. § 332(c)(7)(B).

More generally, Congress granted the FCC specific authority to remove barriers to the entry of new telecommunications services by enacting 47 U.S.C. §253(d) as part of the 1996 Act, which empowers the FCC to preempt the enforcement of any state or local government statute, regulation or legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Three years earlier, Congress had directed the Commission to produce an annual report on the state of competition in the mobile service marketplace that ensured its continuing attention to precisely the issues and evidence leading to the Declaratory Ruling. 47 U.S.C. § 332(c)(1)(C).

More recently, in response to perceived resistance by local authorities to national broadband deployment, Congress significantly narrowed the scope of the state and local zoning review that can be imposed on collocations to and modifications of existing towers and base stations used to provide wireless services in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("TRA"), codified at 47 U.S.C. §1455(a). In TRA Section 6003, Congress granted the FCC authority to "implement and enforce" Title VI of the TRA "as if this title is a part of the Communications Act of 1934." It is beyond argument that Congress intends the FCC to have a robust and vital role in helping Congress achieve the national goal of rapid deployment of new and competitive wireless services, to enable consumers to secure the benefits that derive from a healthy competition among wireless service providers.

Petitioners and their *amici* assert the Fifth Circuit erred in according *Chevron* deference to the FCC's determination. They insist that reviewing courts must ignore an agency's own assessment of its power to administer the statute, even when the agency has done no more than interpret the very words Congress used. They assert that to do otherwise would amount to appointing the fox to guard the henhouse. City of Arlington Br. 28. They also invoke federalism concerns, contending that deference to an agency's assessment of its own authority to interpret a statute it administers could allow the agency to tread on authority reserved for state and local government. City of Arlington Br. 12-13. Those arguments are incorrect. They ignore the extensive history of judicial deference to the FCC, particularly in upholding interpretations offered with respect to specific provisions enacted by Congress.

1. As Justice Scalia correctly concluded in his concurrence to *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380 (1988), the Court has long and repeatedly held that *Chevron* deference "applies to an agency's interpretation of a statute designed to confine its authority." The following cases, some of which Justice Scalia cited, support that proposition:

- *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969), where in deciding whether the FCC's jurisdiction extended to issuing rules governing personal attacks, the Court held that the Commission had such jurisdiction, relying on "the [ ] venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ."

- *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975), where in deciding whether the NLRB had jurisdiction to decide that the National Labor Relations Act permitted employees to bring union representatives to disciplinary interviews, the Court held that the Board's exercise of jurisdiction "should have been sustained" because it was "a permissible construction" of the Board's power.
- *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 304 (1977), where in deciding whether the NLRB had jurisdiction over employees who truck poultry to farms to feed chickens, the Court upheld the Board's jurisdiction on the ground that "regardless of how we might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order."
- *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 n.7 (1984), where the Court expressly *rejected* the argument that "because 'the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board," and noted that it had never "held that such an exception exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here."

- *Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1985), where in deciding whether the EPA had power to modify certain requirements, which modifications were argued to be beyond its jurisdiction, the Court afforded *Chevron* deference to the agency on the ground that "the statutory language does not foreclose the Agency's view of the statute. We should defer to that view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress."
- *CFTC v. Schor*, 478 U.S. 833, 844-45 (1986), where the Court deferred to the CFTC's determination that the Commodity Exchange Act grants the CFTC "the power to take jurisdiction over" state law counterclaims to federal reparations claims, holding that the CFTC's "interpretation of the statute it is entrusted to administer" was entitled to "considerable" deference.
- *City of N.Y. v. FCC*, 486 U.S. 57, 64 (1988), where in deciding whether the FCC had jurisdiction to preempt state and local technical standards governing the quality of cable television signals, the Court noted that "in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area," and held that courts should defer to such determinations "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned" (internal quotations and citation

omitted).

- *Nat'l Cable & Telecomms. Ass'n v. Gulf Power, Inc.*, 534 U.S. 327, 333, 342 (2002), where in upholding FCC jurisdiction to impose two regulatory provisions, the Court observed that it would have deferred to the FCC's view of its jurisdiction had the jurisdictional grant been ambiguous.

Despite petitioners' attempt to distinguish those cases, the holdings in each support the conclusion that the Court has repeatedly deferred to agencies' readings of their jurisdiction.[2]

2. As the Court has suggested, deference to an agency at *Chevron* Step 0 is particularly appropriate when the agency is engaged in gap-filling, providing interpretive guidance as to key statutory terms used by Congress. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002); Sunstein, *supra*, 92 Va. L. Rev. at 217 ("[W]hether an agency's decision is 'interstitial' has now become highly relevant to the question of deference"). Whatever deference may be appropriate (or not) where an agency is using a broad delegation of authority to launch into new initiatives beyond any Congress may have anticipated, the case for deference must be at its apogee where an agency has

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[2] That Congress intended the FCC to retain its delegated power as to § 332(C)(7)(B) is the conclusion reached by the Sixth Circuit when addressing another subsection, § 332(c)(7)(B)(i)(II), directing that local siting regulation "shall not prohibit or *have the effect of prohibiting* the provision of personal wireless services." *See, e.g., T-Mobile Cent., LLC v. Township of W. Bloomfield*, 691 F.3d 794, 805 (6th Cir. 2012). The Sixth Circuit noted that the FCC had issued its interpretation after a split among the circuits, *id.*, based on its expertise and in a commendable effort to quell confusion.

unmistakable broad power and is using it simply to fill statutory gaps through the use of its expertise. The agency in this latter scenario is not drawing new lines, but merely making the ones that Congress established clearer and more definite.

When Congress leaves gaps in a statute for an agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. That is particularly so where the issue is sufficiently minor and technical that Congress likely would not have drilled down to the requisite level of detail, and the gap-filling would entail application of the agency's own experience and expertise within the constraints established by Congress. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").

Petitioners concede that when Congress demonstrates the intent to delegate to agencies the authority to resolve statutory ambiguities and make interstitial judgments about the scope of federal law, those agencies are entitled to deference. City of Arlington Br. 11. As the Court explained in *Barnhart*:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the

> question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Barnhart, 535 U.S. at 222 (upholding the Social Security Administration's gap-filling interpretation of phrases in the Social Security Act as within its lawful interpretive authority).

Those considerations weigh heavily in favor of deference here. The FCC ruling at issue expressly provided an interpretation regarding matters resolved by Congress, albeit in broad strokes. Pet. App. 90a-92a, 142a. The Declaratory Ruling was the product of the agency's unique expertise and its understanding of the general problem posed by unreasonable and undue delay in multiple jurisdictions. *See* Pet. App. 96a-97a ("The evidence in the record demonstrates that personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services"); 98a ("the record shows that unreasonable delays are occurring in a significant number of cases"); 98a-106a (extensive findings on the need for gap-filling interpretation). Nor can there be any doubt that the Commission was far better situated and equipped to interpret what is generally a reasonable period of time for local decisions on applications to add personal wireless service facilities than courts could have developed in case-by-case adjudication, and to do so more quickly.

B. THE FCC'S AUTHORITY UNDER § 201(B), APPLIED BY THIS COURT IN *IOWA UTILITIES BOARD*, PROVIDES THE FCC WITH AUTHORITY TO INTERPRET UNDEFINED PROVISIONS OF § 332(C)(7)(B).

Without explanation, petitioners and their *amici* assume that the necessary delegation must be located in the statutory subsection that was the subject of the Commission's Declaratory Ruling, rather than in the broader statutory provisions delegating authority to administer the Communications Act. But multiple decisions from this Court make plain the error of that approach.

1. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-87 (1999), for example, the Court was faced with challenged regulations implementing provisions of the 1996 Act that were argued to be outside the FCC's jurisdiction. In holding that *Chevron* properly applied (*see id.* at 377-78, 397), the Court did not begin with, or limit itself to, the 1996 Act, but considered the Commission's jurisdiction under the Communications Act: "Since Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934, 1996 Act, § 1(b), 110 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions." The Court followed that same approach in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), where in construing the Commission's responsibilities under provisions enacted with the 1996 Act, the Court looked to the delegation to administer the Communications Act, in which the 1996 Act's provisions were codified. *Id.* at

980-81. Section 332(c)(7), like the provisions at issue in those cases, was enacted as part of the 1996 Act.

Rather than insisting (as petitioners and their *amici* do) that any delegated power be framed squarely within the statutory provision under challenge, *Iowa Utilities* relied in the first instance on the Commission's basic authority under 47 U.S.C. § 201(b). It considered the provisions on which the FCC was offering interstitial interpretation not to see if the power to administer was granted in the first place, but only to ask whether the authority otherwise granted had been eliminated or displaced. *Iowa Utils.*, 525 U.S. at 385; *cf. City of N.Y. v. FCC*, 486 U.S. 57, 61, 69 (1988) (noting an absence of language in the Cable Act showing Congress would not have sanctioned the FCC's preemption of state and local cable television technical standards); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172, 177 (1968) (refusing to limit the FCC's authority when nothing in the language, history, or purpose of the Communications Act limits the FCC's authority; "we may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'") (internal citation omitted).

Notably, the Court rejected every attempt to use the later provisions to limit the FCC's previously conferred jurisdiction. Noting the "general authority" conferred by § 201(b), the Court criticized as "overly subtle" the attempts to narrow it by pointing to some word or phrase in (or missing from) the narrower statutes. Placing the burden of establishing carve-outs from that general power to administer squarely on the challengers, the Court framed the question as

whether the opponents had met their burden of showing "enough to displace that explicit authority." *Iowa Utils.*, 525 U.S. at 385; *see also id.* (asking whether challengers showed that the "Commission's § 201(b) authority is [ ] superseded," and holding that statutory provisions that "do not logically preclude the Commission's issuance" of interpretive guidance will generally not suffice).

The FCC's interpretation of § 332(c)(7)(B), suggesting that zoning authorities presumptively should be able to decide on wireless collocation and siting applications within 90 to 150 days, is clearly within its § 201(b) authority, and precisely the type of agency action that is entitled to deference under *Chevron*. "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency," *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 745, 742 (1996), because filling statutory gaps "involves difficult policy choices that agencies are better equipped to make than courts." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 980.

Determining whether an agency has gap-filling authority may be "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead*, 533 U.S. 218, 229 (2001) (quoting *Chevron*, 467 U.S. at 845).

Especially where the FCC is concerned, there can be no doubt that Congress knows full well of this

Court's decisions and expects judicial deference to the FCC's interpretation.[3]

2. Deference to the FCC's interstitial interpretation may well be appropriate in other circumstances, although deference to an agency's assertion of jurisdiction to undertake broader initiatives may raise closer questions than are presented when an agency interprets ambiguous or undefined statutory language at the core of its responsibilities. *See, e.g., Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power, Inc.*, 534 U.S. 327, 342 (2002) (holding that because the "attachments at issue . . . fall within the heartland of the Act, [t]he agency's decision, therefore, to assert jurisdiction over these attachments is reasonable and entitled to our deference").

In this case, moreover, the conclusion (based on § 201(b)) that Congress intended courts to defer to delegated FCC authority used to interpret undefined statutory terms in § 332(c)(7)(B) is supported by at least two further factors: (i) the fact that the policy adopted is in the statute's heartland, aimed at

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[3] Among this Court's holdings according deference to the FCC's rules or orders are *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007); *Nat'l Cable & Telecomms. Ass'n, Inc.*, 545 U.S. 967; *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power*, 534 U.S. 327 (2002); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *City of N.Y.*, 486 U.S. 57; *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); and *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Each of these can fairly be characterized as according deference to agency determinations where the FCC's power to issue the determinations was challenged.

fostering competition in a nationwide system that would be beneficial to consumers, and (ii) the absence of any clear withdrawal of that authority in § 332(c)(7) or other good reason to find § 201(b) inapplicable. The conclusion is additionally supported by Congress's subsequent actions further narrowing the ability of local authorities to thwart the national interest in competitive mobile radio service nationwide. *See supra* at 6 (discussing 47 U.S.C. § 1455(a)).

Section 201(b) empowers the FCC to provide gap-filling interpretation: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[4] The Court has already determined that the authority Congress delegated to the FCC in § 201(b) "explicitly gives the FCC

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[4] *Amici* focus principally on the Commission's § 201(b) authority because it was so comprehensively addressed by this Court in *Iowa Utilities*. But both the Commission and the Fifth Circuit bottomed the Commission's jurisdiction on multiple provisions, including 47 U.S.C. §§ 151, 154(i), and 303(r). *See* Pet. App. 34a, 87-88a; *see also Brand X*, 545 U.S. at 980-81 (stating that §§ 151 and 201(b) "give the Commission the authority to promulgate binding legal rules"); *City of N.Y.*, 486 U.S. at 70 n.6 ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power"); *id.* at 67 (noting additional rulemaking authority under 47 U.S.C. § 154(i); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978) ("[I]t is now well established that this general rulemaking authority [in § 303(r)] supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable").

Congress subsequently further limited local authority concerning cell sites by enacting what is now 47 U.S.C. § 1455(a) and giving the FCC the power to "implement and enforce" that provision. *See supra* at 6.

jurisdiction to make rules governing matters to which the 1996 [Telecommunications] Act applies." *Iowa Utils.*, 525 U.S. at 380; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 58 (2007) ("Congress, in § 201(b), delegated to the agency authority to 'fill' a 'gap'").

Iowa Utilities' Chevron–based holding that the FCC possessed most of the disputed authority it claimed is part of a long line of authority deferring to the FCC's interpretation of its own statutory jurisdiction under those circumstances. *See, e.g.*, *Brand X*, 545 U.S. at 980-81 (holding §§ 151 and 201(b) of the Communications Act "give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction" when the FCC interpreted the applicability of the Communication Act's common carrier regulations); *Nat'l Cable & Telecomms. Ass'n, Inc.*, 534 U.S. at 333 (upholding the FCC's jurisdiction under the Cable Act over pole attachments for comingled television and internet services, and stating that if the statute had been ambiguous, the FCC's assertion of jurisdiction would have been entitled to deference).

C. THE FCC'S AUTHORITY TO INTERPRET § 332(C)(7)(B) IS CONSISTENT WITH CONGRESSIONAL INTENT TO BALANCE FEDERAL AND LOCAL INTERESTS, AS EVIDENT IN THE PLAIN LANGUAGE OF THE STATUTE

Recognizing that an effective national wireless telecommunications network requires the construction and improvement of a national system of cell

sites, and also that land use is generally regulated at the local or state level, Congress sought in the 1996 Act to balance competing federal and local concerns. *See, e.g.*, H.R. Rep. No. 104-204, pt. 1, at 1 (1995) (describing how Congress enacted the Telecommunications Act, in part, "to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new telecommunications technologies"); *see also City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) ("Congress enacted the [Telecommunications Act] to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies. One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers") (internal quotations and citation omitted).

The bargain Congress struck to further the national interest in a nationwide wireless telecommunications network began by first preserving local zoning authority: "[N]othing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). But local authority was expressly "limited" by various federally imposed standards and requirements, including the requirements that local authorities act on siting and collocation applications "in a reasonable period of time," refrain from "prohibiting the provision of personal wireless services," and refrain from discriminating between

"providers of functionally equivalent services." 47 U.S.C. §§ 332(c)(7)(B)(i), (ii); *see generally* Sen. Rep. No. 104-230, pt. 2, at 207-08 (1996)(Conf. Rep.) (preserving state and local zoning authority "except in the limited circumstances as set forth in the conference agreement. . . . The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. . . . Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services.").

By enacting federal limitations on local authority, without defining in any detail the boundaries of those limitations, Congress left the door open for the FCC to engage in interstitial gap filling. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Iowa Utils.*, 525 U.S. at 397. The FCC's rulemaking authority under § 201(b) entitles it to deference when it determines, based on record evidence and its own expertise, that defining certain terms Congress included in the 1996 Act would be useful in furthering the Act's aims. In this instance, the FCC's exercise of authority to define what constitutes a "reasonable period of time" corresponds precisely to the role Congress expected the FCC to have when it enacted the 1996 Act.

Petitioners' protest that the FCC's interpretation of what constitutes a "reasonable period of time" for siting approval runs afoul of federalism concerns is wholly unwarranted, and unsupported by any of the

authorities cited by petitioners. The Court of Appeals correctly observed that § 332(c)(7)(B) "already acts to preempt these state laws by creating a federal time frame defined through reference to reasonableness." *City of Arlington v. FCC*, 668 F.3d 229, 253 (5th Cir. 2012); *see also Iowa Utils.*, 525 U.S. at 381 n.8 ("Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (under the Supremacy Clause of Article VI of the Constitution, a "federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."). And petitioners' suggestion that the separate statutory provision concerning pole attachments reflects a different, proper approach to federalism ignores that that provision itself displaces any state or local regulation if a permitting decision is not made within specified time frames. *See* 47 U.S.C. § 224(c)(3).

Moreover, the FCC did not, as petitioners claim, expand its authority into new domains by creating a broad regulation in a new, previously uncharted field.[5] City of Arlington Pet. Br. 13. When the FCC

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[5] *Amici* agree that the FCC's authority does not extend to areas in which Congress has not delegated it authority, and where the assumption of authority would "wrest a considerable degree of . . control" from local authorities. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979). *Compare id.* at 700, 708 (finding FCC cable television rules inappropriately "transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium" absent congressional delegation of that authority), *with Southwestern Cable*, 392 U.S. at 172-73 (upholding certain FCC rules regarding CATV as within its jurisdiction) *and Midwest Video*, 406 U.S. at 664-65 (same).

interpreted the undefined phrase "reasonable period of time" in § 332(c)(7)(B)(ii), it did not add a new limitation on state and local power, but clarified an *existing* federally-imposed limitation. This interstitial interpretation was crafted after wide-ranging fact-finding that agencies are in a far better position than courts to conduct, and carefully respected the balance between federal and local interests that Congress struck in the plain language of the 1996 Act. It cannot be reasonably understood to have displaced or moved the federal-local boundaries set by Congress.

The FCC's interpretation of undefined terms concerning unreasonable delay that federal law already prohibits does not transfer to the FCC the substantive power to make zoning decisions. *See* City of Arlington Br. 37, 42-43. Rather, leaving state and local responsibility for those decisions untouched, the FCC's interpretive definition of what constitutes a "reasonable period of time" was promulgated to alleviate the destructive impact that state and local delays were causing to the necessary expansion of the nation's wireless infrastructure, and was based on the Commission's expertise and fact-finding capacities. *See* Pet. App. 94a-100a. That judgment is no more than another instance in a long history of rulemaking and adjudication that advances statutory policies clarifying congressional lines that turn out to be too indefinite to serve their purposes in a developing world. *See, e.g., City of N.Y. v. FCC*, 486 U.S. 57, 66-67 (1988) (noting that the FCC, when it prohibited local authorities from imposing stringent technical standards pursuant to its "delegation of authority" and "legitimate discretionary power," had been preempting state and local cable television technical standards for ten years).

It is not hard to hypothesize FCC regulation whose broad displacement of traditional state authority would be so unprecedented, or so contrary to Congress's evident direction, that it might be fairly held to be beyond the Commission's power (*Chevron* Step 0) or contrary to statutory direction (*Chevron* Step 1), or an unreasonable construction of statutory authority (*Chevron* Step 2). But that is not this case, where the Commission has done no more than provide useful, evidence-based interpretation of the lines already drawn by Congress, using its superior capacity to do so when its expertise and fact-finding abilities made plain further guidance was essential.

D. PETITIONERS HAVE FAILED TO SHOW EITHER LANGUAGE OR LEGISLATIVE HISTORY THAT WEIGHS AGAINST DEFERENCE TO THE FCC'S AUTHORITY IN THIS INSTANCE

The FCC's rulemaking authority under § 201(b) and the other provisions cited above, coupled with statutory circumstances that show Congress would have expected the FCC to exercise gap-filling authority to interpret the 1996 Act, trigger a presumption that Congress intended the FCC to have interpretive jurisdiction over § 332(c)(7)(B). *Long Island Care at Home v. Coke, Ltd.*, 551 U.S. 158, 173-74 (2007). Under these circumstances, to show otherwise petitioners must establish that some other provision of the 1996 Act takes that jurisdiction away. "*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. . . . Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable &*

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005).

Entirely absent here are factors that that might weigh against deference to the FCC's assessment of the scope of its gap-filling authority.

1. Nothing in the statutory text reflects any displacement or implicit repeal of the power the Commission would otherwise have to interpret what is a "failure to act" or an "unreasonable period of time" under the § 332(c)(7)(B).

Petitioners claim that § 332(c)(7)(A), which provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or effect the authority of State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities," prohibits the FCC from interpreting a "reasonable period of time" to be 90 to 150 days. City of Arlington Br. 31. That argument fails for two independent reasons.

First, petitioners' argument runs afoul of the "over decisions" clause of § 332(c)(7)(A), which provides that nothing in the Communications Act "[e]xcept as provided in this paragraph . . . shall limit or affect the authority of a State or local government . . . *over decisions regarding the placement, construction, and modification* of personal wireless service facilities" (emphasis added). The Commission's provision of a general timeframe in which state and local authorities should ordinarily decide applications for cell phone tower constructions and improvements does not "limit or affect the authority" of state or local governments regarding "the placement, construction, and modification of personal

wireless service facilities." A federal court adjudication is not "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

Second, nothing in § 332(c)(7)(A) purports to displace or supersede the FCC's longstanding regulatory authority to fill gaps by interpreting the various limitations in § 332(c)(7)(B) (or any provisions of the Communications Act).[6]

Congress's decision to retain in the first instance the traditional authority of state and local authorities over cell sites, subject to federal limitation, is not inconsistent with the Commission's retention of authority to interpret a "reasonable period of time." The Declaratory Ruling addresses only the timeliness of such decisions, and mandates no particular result that any governmental entity must reach. Had Congress sought to deny the Commission any authority to issue gap-filling, interpretive guidance on the "reasonable period of time" limitation, it could have easily said so. The statutory phrasing it did enact is not naturally or properly read as withdrawing the Commission's authority to fill gaps concerning the timing of such decisions.

Moreover, the preservation of state and local authority in § 332(c)(7)(A) is expressly limited by

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[6] *See supra* at 13-14, 18 (discussing *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999)); *see also, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("We have repeatedly stated, however, that absent 'a clearly expressed congressional intention' . . . 'repeals by implication are not favored.' . . . . An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (citations omitted).

§ 332(c)(7)(B) (through the introductory phrase "Except as provided in this paragraph").

Whatever substantive decision a local permitting authority chooses to make, it remains free to make within the limitations imposed by the Communications Act. At most, the FCC's interpretation might affect the judicial determination, in any proceeding under § 332(c)(7)(B)(v), as to whether the local authority acted "within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." § 332(c)(7)(B)(ii). That kind of gap-filling is not what Congress restricted in § 332(c)(7)(A).

The FCC's interpretation did not expand its authority beyond the bounds permitted by the Communications Act, or even approach its limits. The Commission's interpretive ruling falls at the interstitial gap-filling end of the spectrum of potential agency authority, and spoke ultimately to courts. It leaves local authorities free to make traditional arguments related to "the nature and scope of such request" they could or would have made in a proceeding under § 332(c)(7)(B)(v), and federal courts free to consider or be persuaded by any such argument. Acceptance of the FCC's view of its powers on this point is amply supported by this Court's cases. *See, e.g.*, in addition to those cited *supra* at 7-10, *Brand X*, 545 U.S. at 984 (upholding the FCC's rulemaking authority to interpret the definition of "telecommunications service" under the Communications Act, as amended by the 1996 Act); *Iowa Utils.*, 525 U.S. at 385 (upholding the FCC's rulemaking authority under § 201(b) to guide state commissions with rules implementing pricing and nonpricing

provisions of the 1996 Act, without engaging in analysis of whether agency's determination of interpretive jurisdiction is entitled to *Chevron* deference).

Prior to the FCC's issuance of the Declaratory Ruling challenged in this proceeding, the limitations Congress sought to impose on local zoning or regulatory power were for practical purposes unenforced and a nullity. *See generally* Pet. App. 98a (finding, *inter alia*, that "there were then more than 3,300 pending personal wireless service facility siting applications before local jurisdictions . . . approximately 760 [were] pending final action for more than one year"). The Commission's interpretation was not contrary to congressional directive, but in aid of it, and clearly within the FCC's power to so decide.

2. Nor does the legislative history of § 332 help petitioners. They attempt to make much of the fact that the House of Representatives' initial version of § 332(c)(7) explicitly delegated to the FCC power to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services," and adopt policies requiring state and local authorities to act "within a reasonable period of time after the request is fully filed with such government or instrumentality," but was ultimately rejected and revised by Congress. City of Arlington Br. 32 (citing H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995)). But the absence of this language from the final version of the statute is subject to many possible explanations, and does not necessarily reflect Congress's intent to deny such authority to the FCC. Regardless, given the history of this Court's repeated recognition of the FCC's authority to regulate in aid of the broad

statutory directives to foster an advanced, effective national telecommunications system, the Court should defer to the FCC's judgment in the absence, within the four corners of § 332(c)(7), of yet another delegation of interpretive authority. *Cf. Southwestern Cable Co.*, 392 U.S. at 169-70 (the FCC's failure to obtain legislation explicitly authorizing its regulation of CATV systems was not dispositive of the breadth of its existing authority). Congress's decision to create a statutory framework for cell phone tower construction and modification to be filled in by the FCC, rather than to give the FCC unrestricted regulatory authority over these matters, simply reflects the balance Congress sought to strike between federal and local authority in the Communications Act.

Similarly overreaching is petitioners' contention that because the FCC was ordered to terminate "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities," Sen. Rep. No. 104-230, pt. 2, at 208 (1996) (Conf. Rep.), Congress intended to prevent the FCC from interpreting § 332(c)(7)(B). That language concerned only "pending" rulemakings "concerning the preemption of local zoning authority." It has no bearing on an as-yet-uncontemplated proceeding ten years later aimed not at preempting local siting decisions but at alleviating unanticipated delays.

Although petitioners also point to legislative history showing that the 1996 Act establishes "limitations on the role and powers of the Commission . . . relate to local land use regulations," they identify nothing in the legislative history that shows Congress intended to prohibit the FCC's power

to make clearer and more easily enforceable the lines Congress drew in § 332(c)(7)(B). City of Arlington Br. 32-33. Congress's judgment not to displace local zoning power altogether does not require the displacement of the FCC's regulatory authority that the petitioners seek. *See* Sen. Rep. No. 104-230, pt. 2, at 207-08 (1996) (Conf. Rep.) (preserving state and local zoning authority "except in the limited circumstances as set forth in the conference agreement. . . . Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services."); *cf. id.* at 209 ("The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications"). The Court of Appeals correctly found that the legislative history "does not indicate a clear intent to bar FCC implementation of the limitations already expressly provided for in the statute." *City of Arlington v. FCC*, 668 F.3d 229, 253 (5th Cir. 2010).

Nor is the interpretive authority otherwise created by § 201(b) displaced by the provision in § 332(c)(7)(B)(iv) concerning radio emissions. It is not at all unusual, in the Communications Act or elsewhere, for general and specific grants of authority to overlap, or for Congress to highlight specific areas it wants a court or agency to address. *See, e.g., Iowa Utils.*, 525 U.S. at 383 n.9, 385 (finding no inconsistency with the FCC's requisite rulemaking authority under § 251(e) and its authorization to engage in rulemaking under § 201(b)). To paraphrase the reasoning in that opinion, it would be peculiar for

Congress to have "conferr[ed] Commission jurisdiction over such curious and isolated matters as [radio frequency emissions] . . . but den[ied] Commission jurisdiction over much more significant matters. We think it most unlikely that Congress created such a strange hodgepodge." *Iowa Utils.*, 525 U.S. at 381 n.8.

Also meritless is the argument that because Congress intended the courts to have "exclusive jurisdiction over all other disputes arising under this section," Sen. Rep. No. 104-230, pt. 2, at 207-08 (1996) (Conf. Rep.), it necessarily intended to prevent the FCC from interpreting § 332(c)(7)(B). City of Arlington Br. 5. The FCC's interpretive rule does not claim for the FCC any "jurisdiction over [ ] disputes arising under this section." The provision giving courts exclusive jurisdiction over such proceedings does not repeal, impliedly or otherwise, the FCC's authority to interpret and enforce the substantive prohibitions of § 332(c)(7). Courts alone entertain such proceedings, and only they have the final say over whether any specific delay in processing wireless collocation and siting requests is "reasonable."

Nor is the provision of a right of action inconsistent with the FCC's continuing interpretive rulemaking authority to clarify when a wireless provider could seek judicial relief under § 332(c)(7)(B)(v). *Cf. City of N.Y. v. FCC*, 486 U.S. 57, 69 n.5 (1988) (holding that FCC cable television technical standards preempted state and local standards, despite availability of remedy for state and local authorities to petition the FCC for individualized waivers on standards). "None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority." *Iowa Utils.*, 525 U.S. at 385 ("While it is

true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . and granting exemptions . . . these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments"). While the FCC's Declaratory Ruling appropriately provides a trigger for bringing an action in court, the FCC expressly confirmed that any case-specific unreasonable delay determinations were for courts to make in § 332(c)(7)(B)(v) proceedings. Indeed, the Commission rejected a proposal that its Ruling deem as granted applications on which state and local authorities had not acted within the 90 to 150-day timeframe. Pet. App. 106a-112a.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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